No. 87-470-CSX
Status: GRANTED

Title: Fort Wayne Books, Inc., Petitioner
v.
Indiana, et al.

Docketed:
September 16, 1987

Court: Supreme Court of Indiana

Counsel for petitioner: Weston,John H. —

See also:
87-614

Counsel for respondent: Daily,William E., Goldsmith,Steven

Entry	Date	Note	Proceedings and Orders
1	Sep 16 1987	G	Petition for writ of certiorari filed.
2	Sep 16 1987		Appendix of petitioner Ft. Wayne Books, Inc. filed.
3	Oct 21 1987		DISTRIBUTED. November 6, 1987
4	Oct 30 1987	G	Motion of PHE, Inc. for leave to file a brief as amicus curiae in No. 87-470 filed.
5	Oct 30 1987	G	Motion of Video Software Dealers Association for leave to file a brief as amicus curiae in No. 87-470 filed.
7	Oct 30 1987	G	Motion of American Booksellers Association, Inc., et al. for leave to file a brief as amici curiae in No. 87-470 filed.
9	Oct 30 1987		Waiver of right of respondent Indiana to respond filed.
8	Nov 4 1987		Brief amicus curiae of Burke Mendenhall filed.
6	Nov 5 1987	P	Response requested -- TM. (Due December 5, 1987)
11	Feb 8 1988	X	Brief of respondent Indiana filed.
10	Feb 17 1988		REDISTRIBUTED. March 4, 1988
12	Mar 7 1988		Motion of PHE, Inc. for leave to file a brief as amicus curiae in No. 87-470 GRANTED.
13	Mar 7 1988		Motion of Video Software Dealers Association for leave to file a brief as amicus curiae in No. 87-470 GRANTED.
14	Mar 7 1988		Motion of American Booksellers Association, Inc., et al. for leave to file a brief as amici curiae in No. 87-470 GRANTED.
15	Mar 7 1988		Petition GRANTED. The case is consolidated with 87-614, and a total of one hour is allotted for oral argument.
			**********
17	Mar 28 1988		Order extending time to file brief of petitioner on the merits until May 12, 1988.
18	Apr 1 1988		Record filed.
		*	Certified original record, box, received.
19	Apr 27 1988		Application of petitioner for leave to file merits briefin excess of the page limitation (A-834), and order granting same by Stevens, J., on April 28, 1988. Brief not to exceed 65 pages.
20	May 12 1988	G	Motion of Video Software Dealers Association for leave to file a brief as amicus curiae filed.
21	May 12 1988	G	Motion of PHE, Inc. for leave to file a brief as amicus curiae filed.
22	May 12 1988		Lodging received. (8 copies).
23	May 12 1988		Joint appendix filed.
24	May 12 1988		Brief of petitioner Ft. Wayne Books, Inc. filed.
25	May 12 1988	G	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
26	May 12 1988	G	Motion of Spartacist League, et al. for leave to file a brief as amici curiae filed.
27	May 12 1988	G	Motion of American Booksellers Association, Inc., et al. for leave to file a brief as amici curiae filed.
28	May 23 1988		Motion of Video Software Dealers Association for leave to file a brief as amicus curiae GRANTED.
29	May 23 1988		Motion of PHE, Inc. for leave to file a brief as amicus curiae GRANTED.
30	May 31 1988		Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
31	May 31 1988		Motion of Spartacist League, et al. for leave to file a brief as amici curiae GRANTED.
32	May 31 1988		Motion of American Booksellers Association, Inc., et al. for leave to file a brief as amici curiae GRANTED.
34	Jun 10 1988		Order extending time to file brief of respondent on the merits until July 7, 1988.
35	Jun 29 1988		Brief amicus curiae of Morality In Media, Inc. filed. VIDED.
36	Jul 7 1988		Brief amicus curiae of National District Attorneys' Assn. filed.
37	Jul 7 1988		Brief of respondent Stephen Goldsmith filed.
38	Jul 7 1988		Brief amicus curiae of Tom Collins filed.
39	Jul 7 1988		Brief of respondents Indiana, et al. filed. VIDED.
42	Jul 7 1988		Brief amicus curiae of Arizona filed.
40	Jul 15 1988		Set for argument. Monday, October 3, 1988. This case is consolidated with 87-614. (3rd case) (1 hr.)
41	Jul 20 1988		CIRCULATED.
43	Jul 29 1988	N	Motion of respondent Stephen Goldsmith for divided argument filed.
44	Aug 5 1988	X	Reply brief of petitioner Ft. Wayne Books, Inc. filed.
47	Aug 7 1988	G	Motion of James J. Clancy, et al. for leave to file a brief as amici curiae filed.
45	Aug 12 1988		Opposition of petitioner Ft. Wayne Books to motion of respondent Stephen Goldsmith for divided argument filed.
46	Aug 13 1988		Reply of respondent Stephen Goldsmith to petitioner Ft. Wayne Books' opposition to divided argument filed.
52	Sep 26 1988	D	Motion of Burke H. Mendenhall for leave to intervene filed.
48	Oct 3 1988		Motion of James J. Clancy, et al. for leave to file a brief as amici curiae GRANTED.
49	Oct 3 1988		ARGUED.
51	Oct 3 1988		DISTRIBUTED. October 7, 1988. (Motion of Burke H. Mendenhall for leave to intervene).
53	Oct 11 1988		Motion of Burke H. Mendenhall for leave to intervene DENIED.

87-470

No. .....

Supreme Court, U.S.
FILED
SEP 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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42pp

QUESTIONS PRESENTED

1. Is Indiana's civil RICO statute an impermissible prior restraint of the type described in *Near v. Minnesota,* 283 U.S. 697 (1931), to the extent that that statute was construed to permit the padlocking of numerous bookstores and the mass seizure of not only their entire inventories, but also all their physical equipment including book racks, film projectors, cash registers, etc., all upon an *ex parte* probable cause determination that the stores in question had sold or exhibited two or more allegedly obscene items?

2. Are the First Amendment procedural safeguards of *Freedman v. Maryland,* 380 U.S. 51 (1965), and *Vance v. Universal Amusement Co.,* 445 U.S. 308 (1980), violated by a state law which permits bookstores to be closed by interim padlocking and seizure orders of *indefinite duration* where the law fails to guarantee that a final determination of obscenity will necessarily occur within a specified brief period after the seizure? Does the Indiana Supreme Court's conclusion that the statute requires such a hearing to be held within a "reasonable" time satisfy *Freedman's* requirement of a "specified" brief period where no guidelines are given for determining the duration of this "reasonable" period and the court approved as "reasonable" an *ex parte* seizure which has remained in effect for over a year without any final determination of obscenity?

3. Are the First Amendment principles articulated in *Marcus v. Search Warrant,* 367 U.S. 717 (1961); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964); *Carroll v. Presi-*

dent and Com'rs of Princess Anne, 393 U.S. 175 (1968); *Heller v. New York*, 413 U.S. 483 (1973) and *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), violated by a state law which was construed and applied to permit mass seizures of the entire inventories of numerous bookstores based exclusively upon an *ex parte* showing that two or more of the items sold in the stores are probably obscene? Do these cases continue to require that notice and some form of adversary hearing must occur *prior* to any such mass seizures?

4. May the entire inventory and contents of a bookstore be seized where the issue of obscenity need only be proven by a "probable cause" standard of proof? Does this most minimal evidentiary requirement conflict with the principles this Court articulated in *California ex rel. Cooper v. Mitchell Bros.*, 454 U.S. 90 (1981)?

5. Does Indiana's RICO statute violate the First Amendment principles articulated in *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977), by virtue of the fact that it provides no guarantee of prompt appellate review of either interim or permanent seizure orders and, in one instance, three stores remained closed by virtue of an interim order for over a one-year period before there was even an initial appellate court ruling on a promptly filed emergency stay application?

6. In upholding the sanctions available under the state's civil RICO laws as applied to persons alleged to have violated only the state's obscenity laws, did the Indiana Supreme Court ignore this court's holdings in *Thomas v. Collins*, 323 U.S .516 (1945) and *Schad v. Burrough of Mt. Ephraim*, 452 U.S. 61 (1981), that the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised by the state?

7. Do Indiana's civil RICO statutes' post-trial remedies, as sanctioned by the Indiana Supreme Court, violate the First Amendment guarantees against prior restraint articulated in *Near v. Minnesota, supra*?

LIST OF PARTIES*

The following is a list of all parties of record in the Indiana Supreme Court in addition to those appearing in the caption of the present petition:

CINEMA BLUE OF FORT WAYNE, INC., EROTIC HOUSE BOOKSTORE, INC., 4447 CORPORATION, WORLD VIDEO SYSTEMS, ISSI THEATER CORPORATION, PLAZA ENTERTAINMENT CENTER and BURTON GORELICK appeared as appellants in the Indiana Supreme Court.

STEPHEN M. SIMS, Prosecuting Attorney for the 38th Judicial Circuit, and STEPHEN GOLDSMITH, Prosecuting Attorney for the 19th Judicial Circuit, appeared as appellees in the Indiana Supreme Court.

As indicated under separate cover, petitioner FORT WAYNE BOOKS, INC., believes that 4447 CORPORATION, WORLD VIDEO SYSTEMS, ISSI THEATER CORPORATION, CINEMA BLUE OF FORT WAYNE, INC., and EROTIC HOUSE BOOKSTORE, INC. have no interest in the outcome of this petition. Accordingly, pursuant to Supreme Court Rule 19.6, petitioner believes the respondents before this Court to be:

THE STATE OF INDIANA
STEPHEN M. SIMS
STEPHEN GOLDSMITH
PLAZA ENTERTAINMENT CENTER
BURTON GORELICK

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* There are no entities to report or list pursuant to this Court's Rule 28.1.

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In The
Supreme Court of the United States
October Term, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported as *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987) and is printed in Appendix A; the order and opinion denying rehearing are reported at 509 N.E.2d 174 (Ind. 1987) and are printed in Appendix E; the order denying a stay pending the timely filing of a petition for certiorari by an unrelated party below is unreported and is printed in Appendix B. The opinion of the Indiana Court of Appeals is reported as *4447 Corporation v. Goldsmith*, 479 N.E.2d 578 (Ind. App. 1985) and is printed in Appendix C.

JURISDICTION

The Supreme Court of the State of Indiana entered its opinion in this matter on March 2, 1987. The Court entered an opinion denying rehearing on June 18, 1987. This petition is filed within 90 days of that date. The opinion of the Indiana Supreme Court constitutes a final judgment in a civil case upholding the constitutionality of various pre-trial restraints on constitutionally protected expression imposed pursuant to Indiana's state RICO law. The Court's opinion also implicitly gave constitutional approval to the post-trial forfeiture remedies available under that same law. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 2101(c).

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROVISIONS FROM INDIANA CODE

The pertinent provisions of the Indiana Code are presented in Appendix F. The sections so included are: IC §§ 34-4-30.5-1 through 34-4-30.5-6, §§ 35-45-6-1 and 35-45-6-2, §§ 35-49-1-1 through 35-49-1-10, § 35-49-2-1, and §§ 35-49-3-1 through 35-49-3-4.

—o—

STATEMENT OF THE CASE

This case involves the question of whether the seizure and padlocking sanctions available under a state's RICO statutes are constitutionally permissible as applied to those whose only alleged offenses involve the sale or exhibition of two or more allegedly obscene items.

Petitioner Fort Wayne Books, Inc. operates an adult bookstore in Fort Wayne, Indiana, known as Fort Wayne Books. Prior to March 19, 1984, petitioner's bookstore offered for retail sale thousands of different sexually-oriented books, magazines, motion picture films and videotapes, all of which were and are presumptively entitled to constitutional protection. The store also operated numerous motion picture viewing booths wherein a customer could privately view any of a number of different motion picture films or videotapes.

On March 19, 1984, respondents Stephen M. Sims and the State of Indiana filed a complaint against petitioner and others in the Allen Circuit Court of Allen County, Indiana, charging them with violation of Indiana's state civil RICO statute (IC § 35-45-6-1 *et seq.*). The sole bases for the civil RICO allegations were alleged violations of Indiana's obscenity laws.

On that same date, these respondents filed a "Verified Petition for Seizure of Property Subject to Forfeiture, etc." against petitioner and the other defendants, seeking an *ex parte* order authorizing them to padlock petitioner's bookstore and two other bookstores and to seize immediately all of the inventory, equipment and corporate assets therefrom. This petition was supported by a police officer's probable cause affidavit alleging that the corporate owners of these bookstores and their employees had been convicted of certain obscenity offenses that, according to the officer, constituted valid "predicate offenses" triggering application of the RICO statute.[1] The officer also alleged that he had personally viewed a number of motion picture films and videotapes exhibited in petitioner's store and had concluded that they were legally obscene. The officer made similar allegations as to the other two bookstores named in the complaint.

On this same date, March 19, 1984, an *ex parte* hearing was held on the state's forfeiture petition. Neither petitioner nor its agents or attorneys were given any notice of the hearing.

[1] Petitioner does not agree that any of the convictions alleged in the officer's affidavit constitute valid predicate offenses under Indiana's RICO statute. However, resolution of this issue will involve complicated issues of statutory construction not here relevant. Of course, since the seizure application was made ex parte, there was no opportunity for petitioner to contest the officer's assertion that the requisite predicate offenses had been committed.

Following the *ex parte* hearing, the trial court immediately concluded that there was probable cause to believe that petitioner and the owners of the other two bookstores had committed two or more violations of the state's obscenity laws and that such conduct constituted a violation of the state's civil RICO statute. Accordingly, the trial court, without any notice to petitioner or the other affected businesses, issued an order commanding the immediate seizure of the entire contents of each of the three bookstores and authorizing the immediate padlocking of all three stores. (The seizure order is reproduced in Appendix D.)

The authorities then padlocked all three bookstores and denied access to them by store employees and the public alike. No trial date was set, nor has one ever been set in this case.

Thereafter, petitioner promptly filed a motion in the trial court to vacate the *ex parte* order of seizure and closure. This motion asserted that the *ex parte* order lacked the numerous procedural safeguards required by the First Amendment and also, in any event, constituted a prior restraint of First Amendment rights. (Memorandum of Law In Support Of Motion To Vacate And/Or Modify, etc., filed in the Allen Circuit Court on March 27, 1984.)

On March 29, 1984, a hearing was held on petitioner's motion to vacate the *ex parte* order. During the course of this hearing it was brought to the trial court's attention that a virtually identical *ex parte* pretrial closure order had been issued pursuant to these same civil RICO

provisions in a case involving certain adult bookstores in the City of Indianapolis and that this *ex parte* order had been stayed by order of the Indiana Court of Appeals pending disposition of the bookstore owners' interlocutory appeal from the interim closure order. Notwithstanding the Allen County trial court's awareness of this ruling of its own state intermediate appellate court, the trial court, on March 29, 1984, denied petitioner's motion to vacate the *ex parte* closure and seizure order.

The next day, March 30, 1984, after the stores of petitioner and the other defendants had already been padlocked, the authorities then, without notice, commenced removal of the entire contents of the three establishments, including tens of thousands of unlitigated books, magazines and films, as well as items such as film projectors, cash registers and bookracks. As mentioned above, the *sole* basis for these mass seizures was the allegation that each store had committed two or more prior obscenity offenses.

On April 3, 1984 the defendants filed an Emergency Motion for Inventory of Property Removed and/or for Return of Property. This motion was denied by the trial court on April 4, 1984.

On April 3, 1984 and thereafter, on April 12, 1984, the defendants filed with the trial court a petition to certify and a supplemental petition to certify its interim orders as appealable by interlocutory appeal. On April 18, 1984 the trial court granted the request for certification but denied a motion to stay its interim injunctive order pending the interlocutory appeal. On April 27, 1984, the corporate defendants, including petitioner, perfected their interlocutory appeal and simultaneously filed in the Indiana Court of Appeals an emergency stay application, designated as Motion For Stay (Modification) Of Interlocutory Injunction Without Bond Pending Appeal. Petitioner's stay application asserted, *inter alia*, that, under *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977), a stay pending appeal was mandatory because state law did not provide for immediate appellate review of the interim *ex parte* closure order. Petitioner's other substantive and procedural challenges were jointly presented in its stay application and in its briefs filed on the merits of the interlocutory appeal.

Despite repeated written and oral requests by petitioner and the other appellants for immediate consideration of their stay application[2] pending the interlocutory appeal,

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[2] On May 2, 1984, five days after petitioner filed its application for stay in the Court of Appeals, respondent Sims filed a Verified Petition For Transfer Of Case to the Supreme Court of Indiana. Under Indiana law, the effect of the filing of such a petition is to immediately divest the Court of Appeals of jurisdiction over both the stay application and the merits of the interlocutory appeal. However, this procedural device placed the issues relevant to the stay squarely before the Supreme Court of Indiana. Nonetheless, after nearly three months, the Indiana Supreme Court denied the petition for transfer on July 17, 1984 and expressly remanded the stay application back to the Court of Appeals.

Petitioner then expected a prompt consideration of its stay application because two days after the Petition For Transfer had been filed (May 2, 1984) the Court of Appeals transferred the Fort Wayne case to the division of the Court of Appeals which had issued a similar stay request in the Indianapolis case. However, when, by September 23, 1984, no action had yet been taken by the Court of Appeals on the stay application, petitioner filed another document in the Court of Appeals entitled "Request For Expeditious Ruling On Motion For Stay (Modification) Filed April 27, 1984."

Respondent Sims filed papers on October 10, 1984 urging the Court to defer action on the stay request pending ultimate resolution of the appeal.

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there had still been no appellate ruling on the stay application as of March 26, 1985, nearly a full year after it was filed. Throughout that time, all three bookstores remained sealed and padlocked by virtue of the trial court's unreviewed *ex parte* closure order.

On March 26, 1985, petitioner and the other bookstore owners filed an application to Circuit Justice Stevens of this Court for a stay of the *ex parte* interim injunctive order.[3] Acting in his capacity as Circuit Justice, Justice Stevens ordered respondents to respond to petitioner's stay application on or before April 4, 1985.

On April 4, 1985, the Indiana Court of Appeals rendered moot the stay application presented to Justice Stevens by finally granting the year-old stay application. Thereafter the padlocks were removed and the three bookstores were allowed to resume operations pending the outcome of the appeal.

During roughly the same period that the foregoing litigation involving the Fort Wayne bookstores was taking place, a similar state RICO action was filed and litigated against three wholly unrelated bookstores in Indianapolis. These three stores were alleged to be part of one "enterprise." The primary difference was that there were no allegations in the Indianapolis case that any of the stores or their employees had been convicted of *any* obscenity violations. Rather, that RICO complaint was based exclusively upon probable cause allegations of obscenity viola-

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In addition to the foregoing efforts of petitioner to secure appellate consideration of its stay application, its counsel made repeated calls to the Clerk of the Court of Appeals advising them of the need for prompt consideration of the stay application.

[3] *Fort Wayne Books, et al. v. Indiana, et al.*, Docket # A-734.

tions at two of the three stores. The other primary difference is that in the Indianapolis case, one of the three stores had not yet opened at the time the court issued its *ex parte* order.

The Indianapolis trial court issued an *ex parte* order commanding the sealing of the one not-yet opened store but allowing the other two stores to continue to operate, subject to the restraint that they could not transfer any of their assets. There was no allegation that the restrained store had ever violated *any* obscenity law.

Just as in the Fort Wayne litigation, the Indianapolis bookstores filed an interlocutory appeal from the interim *ex parte* orders and simultaneously sought a stay from the Court of Appeals pending the outcome of the interlocutory appeal. That stay was granted on February 2, 1984.

On May 4, 1984 the Indiana Court of Appeals ordered the consolidation of the interlocutory appeals in the Indianapolis case and the Fort Wayne case. Even so, as mentioned above, the Court of Appeals inexplicably delayed ruling on the Fort Wayne appellants' stay application until nearly a year later, April 4, 1985.

On June 12, 1985 the Indiana Court of Appeals issued its ruling on the consolidated interlocutory appeal. (Appendix C.) The court concluded that, as applied to those whose only alleged offenses involve violations of the state's obscenity law, the seizure and padlocking sanctions of the state RICO Act constitute an unconstitutional prior restraint of First Amendment rights. The court also concluded that the statute and the appealed *ex parte* orders are unconstitutional because they lack several procedural safeguards required by the First Amendment.

Thereafter, the Indiana Supreme Court reversed the judgment of the Court of Appeals. In a split opinion, the

majority concluded that a statute authorizing direct sanctions against protected expression need not be measured by First Amendment standards if the legislative purpose was non-censorial. It was apparently immaterial to the court's holding that the sanctions only come into play upon a finding of unlawful *expressive* activity. (Contrast this Court's recent holding in *Arcara v. Cloud Books,* — U.S. —, 106 S.Ct. 3172 (1986).) Concluding that the statutory purpose of including obscenity as a predicate RICO offense was unrelated to a desire to suppress speech, the court held that the Court of Appeals had erred in subjecting the statute to First Amendment-prior restraint analysis. Dissenting, Judge DeBruler disagreed with the underlying premise of the majority opinion, choosing to rely instead on this Court's holding most recently articulated in *Schad v. Burrough of Mt. Ephraim,* 452 U.S. 61, 68 (1981), that "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised [by the state]."

The majority also rendered two significant constructions of the statute. First, it held that the state need not allege *any* prior obscenity convictions but need only make probable cause allegations of unproved obscenity violations. Second, in upholding the Indianapolis order sealing the one location which had never been open, the court necessarily construed the statute so that two or more obscenity violations at any one store in a chain of stores justifies closure orders directed to any or all of the stores in the chain.

Finally, the majority opinion rejected petitioner's claim that the *ex parte* seizure and padlocking procedures authorized by the statute lacked adequate procedural safe-

guards required by the First Amendment. Specifically, the majority entirely ignored petitioner's contention that mass seizures of literature can never be conducted on the basis of *ex parte* probable cause determinations.

The only one of petitioner's procedural arguments specifically addressed by the court's opinion was the contention that the interim restraints are void because they are of indefinite duration and that the statutory scheme fails to require a final trial court determination of obscenity within a *fixed* or *specified* brief period. The court noted that the statute does not require trial to be set within any specified period of time after execution of the seizure order. However, rather than reading into the statute a specific time limit for the holding of such a trial, the court instead construed the statute merely to require a trial "within a 'reasonable' time."

For reasons not here relevant, the three bookstores involved in the Indianapolis litigation have ceased doing business as have all of the Fort Wayne bookstores except for petitioner, Fort Wayne Books, Inc.

There has been no trial yet in this action nor has a trial date been set.

Petitioner has been informed that, absent this Court's review, respondent Sims will reinstitute the padlocking of petitioner's store.

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REASONS FOR GRANTING THE WRIT

I

THE INDIANA SUPREME COURT'S DECISION UPHOLDING THE RICO STATUTE'S LACK OF PROCEDURAL SAFEGUARDS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

A. The Statute's Authorization of Ex Parte Orders Authorizing Mass Seizures and Padlocking of Businesses Engaged in First Amendment Activity Without Notice or a Prior Adversary Hearing Is in Conflict with This Court's Opinions in Marcus v. Search Warrant, 367 U.S. 717 (1961); Quantity of Books v. Kansas, 378 U.S 205 (1964); Carroll v President and Com'rs of Princess Anne, 393 U.S. 175 (1968); Heller v. New York, 413 U.S. 483 (1973); and Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

The Indiana Supreme Court's opinion approved of the *ex parte* seizure and padlocking order in this case even though respondents made absolutely *no attempt to notify* petitioner nor was petitioner given *any* opportunity to appear and be heard prior to the issuance of the order authorizing seizure of an enormous quantity of presumptively protected media materials.

In *Marcus v. Search Warrant*, 367 U.S. 717 (1961) and *Quantity of Books v. Kansas*, 378 U.S. 205 (1964), this Court held that there could be no mass seizure of the inventory of a book store in the absence of a prior adversary hearing wherein the court could focus searchingly on the obscenity of every item which the State sought to seize.

In the subsequent case of *Carroll v. President and Com'rs of Princess Anne*, 393 U.S. 175 (1968), this Court

expanded the principles of *Quantity of Books* into a general prohibition of *ex parte* injunctions restraining activities ordinarily constituting speech and press activity. *Carroll* held that, at a bare minimum, some advance notice is required in every case.

Finally, in *Heller v. New York*, 413 U.S. 483 (1973); *Lo-Ji Sales v. New York*, 442 U.S. 319 (1979); and *New York v. P. J. Video, Inc.*, — U.S. —, 106 S.Ct. 1610 (1986), this Court indicated that it continues to follow the holdings in *Quantity of Books* and *Marcus*, both *supra*, that "the large scale seizure of books or films constituting a 'prior restraint' must be preceded by an adversary hearing on the question of obscenity." *P. J. Video, supra*, — U.S. —, 106 S.Ct. at 1614.

Accordingly, the *ex parte* order upheld by the Indiana Supreme Court is in conflict with a substantial body of this Court's precedent.

B. The Statute's Authorization of Interim Seizure and Padlocking Orders of Indefinite Duration Is in Conflict with This Court's Opinions in Freedman v. Maryland, 330 U.S. 51 (1965) and Vance v. Universal Amusement Co., 445 U.S. 308 (1980).

The *ex parte* seizure order in this case was an interim order of indefinite duration based upon a mere probable cause showing that two or more obscenity violations had occurred. This is precisely the type of procedure that was most recently condemned by this Court in *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980). In *Vance* this Court condemned a Texas statutory scheme whereby a trial court was authorized to issue an interim injunction of indefinite duration against the exhibition of

any obscene motion pictures whether named or unnamed, all upon a preliminary finding that one or more obscene film(s) had been exhibited in the past. Relying upon its holdings in *Freedman v. Maryland,* 380 U.S. 51 (1965), and *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975), this Court concluded that the indefinite duration of the interim injunction created an impermissible prior restraint upon the exhibition of films which may or may not ultimately prove to be obscene in a final determination.

In *Freedman, supra,* this Court held that any restraint on the exhibition of films believed to be obscene prior to a final judicial determination on the merits must be limited to "the shortest *fixed* period compatible with sound judicial resolution." (Emphasis added) 380 U.S. at 59. As the Indiana Supreme Court conceded, there is nothing in the statutory framework here at issue which compels a final judicial determination within any specified period. Although the Indiana Supreme Court had the opportunity to engraft a fixed period into the statute by way of an authoritative saving construction, it declined to do so and instead, simply held that the statute required trial to occur "within a 'reasonable' time" without any further clarification of that phrase. The facts of the present case patently demonstrate the unworkability of so vague a standard.

C. The Statute's Failure To Guarantee Any Prompt Appellate Review of Interim or Permanent Seizure and Padlocking Orders Is in Conflict with This Court's Holding in National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977).

The Indiana statutory RICO scheme not only fails to require a prompt *trial court* determination of the merits

of the forfeiture proceeding, but fails to guarantee the availability of either "immediate" or "prompt" *appellate* review of any interim or final injunctive orders. The gravity of this defect was illustrated by the facts in this very case. Petitioner filed an application for a stay in the Indiana Court of Appeals within a few days of the date that the trial court denied its motion to vacate the *ex parte* seizure order. Notwithstanding every effort by petitioner to attempt to gain prompt appellate review of the stay application, it was over a year before the Court of Appeals finally granted the requested stay. Throughout that time period all three Fort Wayne bookstores remained closed under the force of the *ex parte* padlocking order.

In *National Socialist Party of America v. Village of Skokie,* 432 U.S. 43 (1977), a trial court had entered a permanent injunction preventing petitioners from conducting a march or parade displaying the swastika within the village of Skokie, Illinois. Relying once again on the seminal case of *Freedom v. Maryland, supra,* this Court held that the petitioners were entitled, as of right, to a stay of that injunctive order in the absence of "immediate appellate review" of the trial court's injunction. *Accord, M.I.C., Ltd. v. Bedford Township,* 463 U.S. 1341 (1983) (per Brennan, J., as Circuit Justice). It would seem to follow with equal force that any interim *ex parte* injunction of speech-related activities such as was issued by the trial court herein would be equally void absent a guarantee of immediate, or at least very prompt, appellate review.

Although there has now been a ruling on petitioner's interlocutory appeal, the facts of this case demonstrate that this is an issue which, if left unresolved, will continue

to cause substantial irreparable injury while evading ultimate appellate review. Accordingly, this Court is urged to grant review and squarely delineate that neither interim nor permanent restraints of the type involved in this case may constitutionally be enforced prior to final judicial resolution absent an express statutory guarantee of prompt appellate review which must occur within a specified brief period.

D. The Statute's Authorization of Mass Seizures Based Only Upon a Probable Cause Standard of Proof of Obscenity Is in Conflict With the Principles Articulated in California ex rel. Cooper v. Mitchell Bros., 54 U.S. 90 (1981).

In *California ex rel. Cooper v. Mitchell Bros.*, 54 U.S. 90 (1981), the State brought an action seeking to permanently restrain the exhibition of specific allegedly obscene films. The issue presented to this Court was whether or not the trial court erred in concluding that the State was constitutionally required to prove obscenity by the evidentiary standard of "beyond a reasonable doubt." This Court did not resolve the question of the *minimal* standard of proof that is constitutionally required, but merely held that proof beyond a reasonable doubt was not required in that case. This Court's opinion, however, recognized that there was a lesser standard of proof, the "clear and convincing" standard, which was "reserved to protect particularly important interests in a limited number of civil cases." 454 U.S. 93. Relying on this language, the California appellate court on remand concluded that the clear and convincing evidence standard was in fact constitutionally required by the First Amendment. See *People ex rel.*

Cooper v. Mitchell Brothers', 128 Cal.App.3d 937, 180 Cal. Rptr. 728 (1982).

In the present case, a restraint far greater than that of a few specific films found obscene occurred. Here, the Court's *ex parte* order prohibited petitioner from exhibiting not only the few films specifically found to be probably obscene, but also prevented petitioner from exhibiting *any* films or from selling any books, magazines, videotapes, etc. While restraints as pervasive as those imposed here by the trial court would be impermissible under *any* standard of proof, certainly the "probable cause" standard of proof utilized herein is *far* below the minimal constitutional threshold for *any* type of injunction of presumptively protected expression.

II

THE USE OF RICO LAWS TO RESTRAIN ALL PRESUMPTIVELY PROTECTED FUTURE SPEECH BY THE DEVICE OF PADLOCKING A BUSINESS FOUND TO HAVE VIOLATED OBSCENITY LAWS IN THE PAST, PRESENTS AN EXTREMELY IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH REQUIRES RESOLUTION BY THIS COURT.

A. This Court Should Resolve Whether the Doctrine of Prior Restraint Established in Near v. Minnesota, 283 U.S. 697 (1931), Prohibits the State From Padlocking a Bookstore, Thus Restraining All Future Speech at Such Store, Simply Based Upon Two or More Alleged Violations of State Obscenity Laws.

The trial court's *ex parte* seizure order, pursuant to which vast quantities of presumptively constitutionally protected materials were removed from petitioner's store,

is in clear conflict with the various "First Amendment due process" lines of case authority discussed *supra*. However, by also commanding the seizure of *neutral* items necessary for conducting the business (*e.g.*, cash registers, film projectors, book racks, etc.) and ordering the padlocking and sealing of all three book stores, the trial court's order also *prospectively* prevented petitioner from selling or exhibiting media materials which did not even exist at the time of the trial court's order. This absolute restraint on *future* presumptively protected activity is precisely the type of restraint which this Court condemned in the landmark case of *Near v. Minnesota*, 283 U.S. 697 (1931).

In *Near, supra*, this Court struck down a statute providing for the abatement, as a public nuisance, of any business which "regularly or customarily" published defamatory publications.

The plaintiff had filed a civil action under the statute for abatement of a public nuisance, alleging that on nine separate dates the defendant had published defamatory newspaper articles and that the defendant was in the business of "regularly" or "customarily" publishing defamatory articles. The trial court made findings of fact following the allegations of the complaint, concluding that the defendants "did engage in the business of regularly and customarily producing, publishing and circulating a . . . defamatory newspaper." 283 U.S. at 706. Based on these findings, the Court permanently enjoined the defendants from publishing any future defamatory articles. The Minnesota Supreme Court affirmed the judgment.

On appeal, this Court concluded that the statute's operation and effect was to impose a prior restraint on future publications and that the First Amendment prohibits the states from restraining future presumptively protected expression based upon prior unlawful speech activity.

Indeed, this Court stressed that the *number* of prior speech violations was immaterial to its holding:

> "[I]t does not matter that the newspaper or periodical is found to be '*largely*' or '*chiefly*' devoted to the publication of such derelictions." (Emphasis added). 283 U.S. at 720.

This Court also pointed out that its holding was not affected by whether or not the libelous speech might constitute a criminal act. *Id.* at 720.

Finally, this Court held that the state's characterization of the undesired speech activity as a "nuisance" could not allow the restraint to escape First Amendment scrutiny.

> "Characterizing the publication as a business and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." *Id.* at 720.

Similarly, characterizing two prior obscenity violations as "racketeering activity" provides no talismanic immunity from the constitutional prohibition against prior restraints.

B. Resolution of This Issue by This Court Is Important Because a Growing Number of States Are Adopting Similar RICO Laws and There Is a Conflict Among the States As to Their Constitutionality.

Subsequent to the federal government's enactment of the initial RICO legislation (18 U.S.C. § 1961 *et seq.*), a growing number of states have adopted their own RICO laws and, unlike the original federal RICO statutes, some of these states have included obscenity offenses as predicate acts justifying the full panoply of severe RICO sanctions. For example, the states of Indiana, Florida and Arizona all include obscenity as a predicate offense capable of triggering application of their RICO laws. The growing use of this dangerous enforcement tool strongly militates in favor of this Court's discretionary review.

Moreover, the state courts appear divided on the question of whether these summary and draconinan laws can be used as a substitute for enforcement of traditional obscenity statutes. In a very recent opinion, the Arizona Court of Appeals cited with approval the opinion of the Indiana Court of Appeals in the present case and disagreed with the majority holding of the Indiana Supreme Court, concluding that the Arizona RICO statute was unconstitutional as applied to situations where the only predicate offenses involved alleged violations of the state's obscenity laws. A copy of that opinion is reproduced in Appendix G.

There is also a split among the lower state and federal courts on the closely related question of whether bookstores or theaters can be padlocked as "nuisances" or have their licenses revoked simply upon a finding that, in the past, they have sold or exhibited one or more obscene items.

The overwhelming majority of state and lower federal courts to have considered this issue have concluded that such restraints violate the First Amendment principles initially articulated in *Near, supra,* and are void on their face.[4]

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[4] The following cases have found nuisance laws unconstitutional which provide for the padlocking of businesses where obscenity offenses have occurred in the past: *Universal Amusement Co., Inc. v. Vance,* 587 F.2d 159, 164-166 (5th Cir. en banc 1978) [as to this particular point, all 14 judges of the en banc court were in agreement], *aff'd.* on other grounds, 445 U.S. 308 (1980); *Pollitt v. Connick,* 596 F.Supp. 261, 269-272 (E.D.La. 1984); *People ex rel. Busch v. Projection Room Theater,* 17 C.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600 (1976), cert. den. 429 U.S. 922 (1976); *General Corp. v. Sweeton,* 320 So.2d 668 (Ala. 1975), cert. den. 425 U.S. 904 (1976); *Kansas v. Motion Picture Entitled "The Bet",* 219 Kan. 64, 547 P.2d 760 (1976); *Gulf States Theaters of Louisiana v. Richardson,* 287 So.2d 480 (La. 1974); *New Riveria Arts Theatre v. Davis,* 219 Tenn. 652, 412 S.W.2d 890 (1967); *Society to Oppose Pornography, Inc. v. Thevis,* 255 So.2d 876 (La.App. 1972); *Giarrusso v. D'Iberville Gallery,* 295 So.2d 891 (La.App. 1974); *State ex rel. Blee v. Mohney Enterprises,* 289 N.E. 2d 519 (In.App. 1973); *Sanders v. State,* 231 Ga. 608, 203 S.E.2d 153 (1974); *State ex rel. Field v. Hess,* 540 P.2d 1165 (Okla. 1975); *Commonwealth ex rel. Davis v. Van Emberg,* 347 A.2d 712 (Penn. 1975); *City of Minot v. Central Ave. News, Inc.,* 308 N.W.2d 851 (N.D. 1981); *Parish of Jefferson v. Bayou Landing Ltd., Inc.,* 350 So.2d 158 (La. 1977); *overruling La.App.,* 341 So.2d 23; *Mitchem v. State ex rel Schaub,* 250 So.2d 883 (Fla.1971). *See also Nihiser v. Sendak,* 405 F.Supp. 482, 491-492 (N.D.Ind.1974), *vacated and remanded on other grounds,* 423 U.S. 976 (1975), *order re-entered* August 16, 1976 (unpub.), *aff'd.* 431 U.S. 961 (1977); *Huffman v. Pursue, Ltd,* 420 U.S. 592, 612, n. 23 (1975); *cf. Speight v. Slaton,* 415 U.S. 333 (1974); *State ex rel. Ewing v. "Without a Stitch",* 307 N.E.2d 911 (Ohio 1974).

The following cases have held unconstitutional laws which allow a permit to be either revoked or denied upon a prior obscenity violation: *Gayety Theaters, Inc. v. City of Miami,* 719 F.2d 1550 (11th Cir. 1983); *Entertainment Concepts Inc. III v. Maciejewski,* 631 F.2d 497, 506 (7th Cir. 1980); *Genusa v. City of Peoria,* 475 F.Supp. 1199, 1207-09 (C.D.Ill. 1979), *aff'd.* 619 F.2d

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Only a tiny fraction of the state and lower federal courts to have considered these issues have upheld such restraints.[5]

C. This Issue Should Be Resolved By This Court Because the Federal RICO Statute Has Been Recently Amended To Include Obscenity As a "Predicate Offense" and Federal RICO Prosecutions Based Solely Upon Obscenity Offenses Have Now Commenced.

Although the federal RICO statute (18 U.S.C. § 1961, *et seq.*) did not originally include obscenity as one of the predicate offenses constituting "racketeering activity," it

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1203, 1217-1220 (7th Cir. 1980); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (D.Utah 1980); *Bayside Enterprises, Inc. v. Carson*, 470 F.Supp. 1140 (M.D.Fla. 1979); *San Juan Liquors v. Consol. City of Jacksonville*, 480 F.Supp. 151 (M.D.Fla. 1979); *Natco Theatres Inc., v. Ratner*, 463 F.Supp 1124 (S.D.N.Y. 1979); *Yuclan Enterprises Inc. v. Arre*, 488 F.Supp. 820 (D. Hawaii 1980); *Avon 42nd Street Corp. v. Myerson*, 352 F.Supp. 994 (S.D.N.Y. 1972); *Oregon Bookmark Corp. v. Schrunk*, 321 F.Supp. 639 (D.Oregon 1970); *Perrine v. Municipal Court*, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. den. 404 U.S. 1038 (1972); *Kuhns v. Santa Cruz Co. Bd. of Sup'rs.*, 128 Cal. App.3d 369, 374-375, 181 Cal.Rptr. 1, 3-4 (1982); *City of Seattle v. Bittner*, 81 Wash.2d 747, 505 P.2d 126 (1973); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370 (Minn. 1975); *City of Delevan v. Thomas*, 31 Ill. App.3d 630, 334 N.E.2d 190 (1975); *Hamar Theatres Inc. v. City of Newark*, 150 N.J.Super. 14, 374 A.2d 502 (1977); *People v. J.W. Productions*, 413 N.Y.S. 2d 552 (N.Y.C.Cr.Ct. 1979); *see also Intern. Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832-833 (5th Cir. 1979); *Fernandes v. Limmer*, 663 F.2d 619, 629-630, 632 (5th Cir. 1981); *cf. Marks v. City of Newport, Ky.*, 344 F.Supp. 675 (E.D.Ky. 1972); *Chulchian v. City of Indianapolis*, 477 F.Supp. 128, 131-132 (S.D. Ind. 1979), *aff'd.*, 633 F.2d 27, 30 (7th Cir. 1980).

5 *See, e.g., State ex rel. Kidwell v. U.S. Marketing Inc.*, 102 Idaho 451, 631 P.2d 622 (1981) and cases there cited.

was recently added in an eleventh hour amendment to 18 U.S.C. § 1961(1). Federal prosecutors have now filed the first federal RICO case where the only alleged predicate offenses involve the interstate transportation of allegedly obscene material.[6]

Since the Department of Justice has now indicated that the Federal Government will be joining in the practice of utilizing RICO sanctions as a new tool for dealing severely with those alleged to have sold or exhibited two or more obscene items, it is incumbent upon this Court to address the threshold question of whether those sanctions can be applied where the exclusive basis for their imposition is allegedly unlawful expressive activity, and if they can be applied at all, whether special procedural safeguards are required.

D. This Court Should Grant Review To Resolve The Same Question of Prior Restraint Upon Which It Noted Probable Jurisdiction in the Case of U.S. Marketing, Inc. v. Idaho, 454 U.S. 1140 (1981), Which Became Moot Prior to Plenary Review.

This Court has already decided that issues virtually identical to those presented by this petition were of sufficient substantiality to warrant the notation of probable jurisdiction. In *U.S. Marketing, Inc. v. Idaho*, 454 U.S. 1140 (1982), this Court noted probable jurisdiction over an appeal from the opinion of the Supreme Court of Idaho ***sub nom. State ex rel. Kidwell v. U.S. Marketing, Inc.***, 102 Idaho 451, 631 P.2d 622 (1981). In that case, the state commenced an action for declaratory and injunctive relief

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6 *United States v. Pryba*, E.D.Va. No. CR 87-00208-A. The indictment in that case was filed on August 14, 1987.

against the owners and lessees of two adult bookstores pursuant to the Idaho Moral Nuisance Abatement Act. The state sought a declaration that some of the materials sold or exhibited by defendants were obscene and asked for an injunctive order to abate the entire premises for a one-year period. Although the trial court found the abatement remedies to be an unconstitutional prior restraint of the type prohibited by *Near v. Minnesota, supra,* the Idaho Supreme Court concluded that that remedy would be constitutionally permissible. This Court then noted probable jurisdiction of the bookstore owners' appeal. 454 U.S. 1140 (1982). However, before the case could be argued, it was dismissed pursuant to Supreme Court Rule 53. 455 U.S. 1009 (1982).

The underlying issue of prior restraint is no less substantial now than it was when this Court noted probable jurisdiction in the *U.S. Marketing* case.

E. Immediate Resolution of This Issue Is Important Because Statutes Such As This One Pose a Severe Danger to the First Amendment Rights of Millions of Americans and to a Wide Range of Communicative Media.

The final, but perhaps most important, reason why this Court should grant review in this case is that the statute upheld in this case represents one of the greatest dangers to the First Amendment rights of millions of Americans and to the entire media industry that has ever been approved by any court.

Statistics cited in news periodicals such as TIME, NEWSWEEK and FORTUNE indicate that sexually frank "adult" films and videotapes have become an increasingly important part of the American entertainment landscape. Community standards have become increasing tolerant regarding adult, sexually-oriented materials, consumption

of which has risen to hundreds of millions of units annually and is predicted to continue to increase dramatically. With respect to videocassette rentals alone, industry statistics indicate some 54,000,000 rentals of X-rated videotapes in 1984, and over one hundred million such rentals in 1986.[7] Moreover, as TIME Magazine (March 30, 1987, at p. 63) has reported, "Women account for perhaps 40% of the estimated 100 million rentals of X-rated tapes each year."

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[7] Several national magazine articles in 1984 provided evidence of the fact that X-rated video cassettes have become standard fare for viewing in American homes: "VCRs: Coming On Strong," TIME Magazine, December 24, 1984 (pp. 44-50); "The Crowded New World of TV," FORTUNE Magazine, September 17, 1984 (pp. 156-166); "The Video Revolution" NEWSWEEK Magazine, August 6, 1984 (pp. 50-57).

According to TIME, nearly 17,000,000 American homes—20 percent of all homes with television sets—now have at least one video cassette recorder. TIME, *supra,* at 45.

> "More than 14,000 pre-recorded [video] cassette [titles] are currently on the market . . . (an estimated 7,000 of them X-rated) . . . ." *Id.*
>
> "An estimated 20,000,000 pre-recorded cassettes will be sold in 1984, better than double the number of a year ago." *Id.*
>
> "[A]n estimated 70 percent to 80 percent of [video cassette recorder owners] buy or rent pre-recorded cassettes at least occasionally." *Id.* at 45.
>
> "Consumers will spend about $1.8 billion dollars to rent cassettes this year and about $500 million dollars to buy them . . . . They rent . . . at prices that average around $5.00 a night and are as low as $1.00 in some cities." FORTUNE, *supra,* at 160.

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"[Explicit] pornography accounts for a hefty share of the cassette business. X-rated movies were among the first to be released for home video and once made up about half of all sales and rentals. That share has dropped to around 15 percent by most industry estimates . . . [M]any VCR owners . . . will sneak-a-peek at X-rated tapes in . . . their own homes." TIME, *supra*, at 47.

"Tapes like these are lining the shelves of more than 12,000 video specialty stores around the country. Their business is skyrocketing." *Id.*

The market is growing explosively. NEWSWEEK estimates that the total annual revenue generated from video rentals and sales could reach $5 billion in 1988, with "adult" materials accounting for 8 percent of that total. NEWSWEEK, *supra*, at 52.

Certain conclusions may be fairly inferred from the foregoing data. If $1.8 billion dollars was spent on video rentals in 1984 (at an average of $5.00 a tape), of which 15 percent was on adult materials, there were 54,000,000 rentals of adult video tapes in 1984. [In light of the fact that there are many stores where tapes rent for substantially less than $5.00 per tape, it is likely that the figure of 54,000,000 rentals is substantially *less* than the actual number of adult video cassette rentals in 1984. Although it is difficult to estimate with any precision the number of people likely to have viewed these 54,000,000 or more rental tapes, any such calculations should take into account the likelihood that most of these tapes were viewed by more than one person. Of course the possibility of multiple rentals by certain consumers should also be considered.]

The corresponding data for 1986 are included in a regularly compiled list of statistical information entitled "Harper's Index," which appeared in the March 1, 1987 edition of the *Los Angeles Times*. Harper's index reported that there were 1,040,000,000 (one billion forty million) rentals of all videotapes in 1986 in the United States. Assuming that the percentage of X-rated video-

(Continued on next page)

The foregoing statistics demonstrate the obvious proposition that the closure of an adult bookstore by the state not only removes from circulation the particular films or magazines believed to exceed community standards, but also necessarily eliminates the public's access to a vast quantity of sexually-explicit media materials that have achieved a notable degree of community acceptance.

Finally, allowing the Indiana Supreme Court's opinion to stand will not only jeopardize the American public's right to view constitutionally-protected media materials which are sexually-oriented, it will also pose a severe threat to a wide variety of broad-based media industries throughout this country. For example, if a state or federal prosecutor can establish a probable cause showing to convince any judge that two or more videotapes rented by a national audio and video outlet chainstore (*e.g.*, Tower Records, The Warehouse Records & Tapes, etc.) are obscene, every store belonging to that chain within the area of the court's jurisdiction would unquestionably be part of the "racketeering enterprise" and subject to the possibility of massive forfeiture or abatement orders. These orders would restrain not only adult videotapes, but by

(Continued from previous page)

tape rentals dropped from 15% in 1984 to 10% in 1986 (because of the enormous expansion of the total number of videotapes available—not because of a decline in the absolute number of X-rated videos rented), then there were 104,000,000 rentals of X-rated videos in 1986.

padlocking the store, would restrain the business from selling or renting a vast variety of general audience videotapes, record albums, cassettes, etc. Moreover, all of this could be achieved by way of an *ex parte* order without any notice to company officials.

Similarly, if a nationwide bookstore chain such as Waldenbooks or B. Dalton should happen to sell two or more copies of an issue of Playboy or Penthouse that a local judge might believe to be probably obscene, not only could the state issue an *ex parte* order closing the entire store and seizing its assets, but, in all likelihood, it could close every store in the chain subject to its jurisdiction.

In another example, this Court in the case of *Jenkins v. Georgia,* 418 U.S. 153 (1974), reversed the findings of a Georgia jury (affirmed by the Georgia Supreme Court) finding the major studio motion picture "Carnal Knowledge" legally obscene under the *Miller*[8] test for obscenity. If any prosecutor in any local jurisdiction were able to similarly convince a judge, *ex parte,* that there was probable cause that any motion picture produced by a major Hollywood studio were obscene, he or she would be authorized to padlock and seize the entire assets of businesses such as Twentieth Century Fox, Universal Studios, etc., all without any notice to the company.

Similarly, these drastic sanctions would be equally available if any local judge became convinced that two or more issues of a newspaper carrying risque editorial cartoons were probably obscene. In the absence of an adversary hearing where the court could be correctly apprised

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[8] *Miller v. California,* 413 U.S. 15 (1973)

of the legal standards for determining obscenity, it is very likely that such a probable cause finding might be made.

For all the reasons noted above, the dangers to free expression posed by the Indiana statutory procedures upheld by the Indiana Supreme Court in this case are perhaps the greatest ever to come before this Court and require review by this Court to end this serious threat to constitutional liberties.

DATED: September 16, 1987

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-470

No. _____

In The

Supreme Court of the United States

October Term, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

vs.

STATE OF INDIANA, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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APPENDIX A

IN THE
SUPREME COURT OF INDIANA

4447 CORPORATION, et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
STEPHEN GOLDSMITH,	)	
	)	No. 4-1283 A 415
Appellee.	)	in the Court of
	)	Appeals
FORT WAYNE BOOKS, INC., et al.,	)	
	)	No. 29S04-8703-
	)	CV-270 in the
Appellants,	)	Indiana Supreme
	)	Court
v.	)	
	)	
STATE OF INDIANA AND STEPHEN M. SIMS,	)	
	)	
	)	
Appellees.	)	

INTERLOCUTORY APPEAL FROM HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
Cause No. C83-346

and

INTERLOCUTORY APPEAL FROM ALLEN CIRCUIT COURT
The Honorable Thomas L. Ryan, Judge
Cause No. CC-84-446

CIVIL PETITION TO TRANSFER

GIVAN, C.J.

These consolidated causes are before the Court on appellees' Petition to Transfer. Appellees filed similar

actions in which they allege the various defendants, owners and operators of adult bookstores, have engaged in racketeering activity as defined in the Racketeer Influenced and Corrupt Organizations Act (RICO), Ind. Code § 35-45-6-1 *et seq.* Appellees seek various remedies as provided in the Civil Remedies for Racketeering Activity (CRRA) statute, Ind. Code § 34-4-30.5-1 *et seq.*

In both cases the trial court, pursuant to Ind. Code § 34-4-30.5-3(b), entered an *ex parte* order seizing appellants' assets. On interlocutory appeal of the denial of appellants' motions to vacate the seizure orders, a majority of the Court of Appeals, Fourth District, held that the RICO and CRRA statutes constitute facially unconstitutional prior restraints in their application to the predicate offense of obscenity. *4447 Corp. v. Goldsmith* (1985), Ind. App., 479 N.E.2d 578, 592. We grant appellees' petition and thereby vacate the opinion of the Court of Appeals.

In 1980, the legislature enacted the Indiana RICO statute, which is essentially patterned after the federal anti-racketeering laws. *See Alvers v. State* (1986), Ind. App., 489 N.E.2d 83. As set out in Ind. Code § 35-45-6-2 (a), a person:

> "(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;
>
> (2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

> (3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;"

commits the offense of Corrupt Business Influence, a Class C felony. "'Racketeering activity' means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation" of any of a number of enumerated predicate offenses, including violation of the obscenity statute. Ind. Code § 35-45-6-1. A "pattern of racketeering activity" is defined as "engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission...." *Id.*

Under the CRRA provisions, the prosecuting attorney in a county in which the violation occurs may bring an action to enjoin a violation of the RICO statute. Ind. Code § 34-4-30.5-2. If the court finds by a preponderance of the evidence that such a violation has occurred, it may:

> "(1) order a defendant to divest himself of any interest in any enterprise or real property;
>
> (2) impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;
>
> (3) order the dissolution or reorganization of any enterprise;
>
> (4) order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;
>
> (5) order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revo-

cation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) make any other order or judgment that the court considers appropriate." *Id.*

Additionally, pursuant to Ind. Code § 34-4-30.5-3(a), the prosecuting attorney in a county in which any of the property is located "may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2." Upon a showing by a preponderance of the evidence that the property in question was so used, the court shall order the property forfeited to the state. *Id.* When a forfeiture action has been filed, the prosecutor may move for an order to have the property subject to forfeiture seized by a law enforcement agency and the court "shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred." Ind. Code § 34-4-30.5-3(b).

The first of the instant cases was commenced on August 1, 1983, when appellee Stephen Goldsmith, Prosecuting Attorney for the Nineteenth Judicial Circuit, filed a CRRA action in Marion Circuit Court. The complaint alleged that the three bookstores owned and operated by the individual and corporate defendants (appellants) comprised an illegal

enterprise as defined in Ind. Code § 35-45-6-1 and that appellants had engaged in a pattern of racketeering activity. The predicate offenses alleged were the distribution of obscene matter in violation of Ind. Code § 35-30-10.1-2 (repealed by Acts 1983, P.L. 311, recodified as Ind. Code § 35-49-3-1).

At the same time Goldsmith filed a Verified Petition for Seizure of Property Subject to Forfeiture. In support of the petition, he attached a probable cause affidavit sworn by Detective Thomas R. Rogers of the Indianapolis Police Department. Detective Rogers stated therein that he and other officers had visited the two operating bookstores alleged to be part of the illegal enterprise, where they observed sexually-oriented books, magazines, films and videotapes available for sale or exhibition. The officers purchased four sexually explicit movies which were submitted to the court.

The officers were informed by one of the bookstore employees that a new bookstore, to be known as the Plaza Entertainment Center, was due to open at 4266 West 38th Street in Indianapolis on August 1, 1983. One of the officers visited that location and spoke to a construction worker, who informed the officer that sexually-oriented materials would be available for sale. In conclusion, Detective Rogers alleged that numerous investigations had led him to the reasonable belief that the two existing adult bookstores were part of a single enterprise and that the enterprise was preparing to open a new bookstore which would sell and exhibit obscene materials.

Based on those representations, the trial court on August 1 found probable cause to believe violations of the RICO statute existed and entered an *ex parte* order com-

pelling the Indianapolis Police Department to seal the unopened bookstore. The court also ordered appellants to preserve certain business equipment located at the two operating bookstores and to list their other property. Trial was set for 72 hours later.

On August 4 appellants filed motions to dismiss the complaint and to vacate the seizure order, based in part on their contention that the order and the RICO statute abridged the exercise of the freedoms of speech and press in violation of the First and Fourteenth Amendments to the United States Constitution. The cause was continued on appellants' motions and later transferred to Hamilton Circuit Court, where on September 8 Goldsmith filed an amended complaint seeking a number of CRRA remedies.

On December 21, 1983, the trial court denied appellants' motions to dismiss the complaint and to vacate the August 1 seizure order. The court, pursuant to Ind.R. App.P. 4(B)(6), then certified for interlocutory appeal the question of whether a seizure order may issue when based on obscenity violations not yet litigated.

On March 19, 1984, appellee Stephen Sims, Prosecuting Attorney for the Thirty-Eighth Judicial District, filed a CRRA action in the Allen Circuit Court. The complaint alleged that the three adult bookstores owned and operated by the various defendants (appellants) comprised an illegal enterprise and that appellants had engaged in a pattern of racketeering activity, the predicate offenses being the distribution of obscene materials. Cited in the complaint were appellants' thirty-nine obscenity convictions entered between June of 1981 and March of 1984.

Sims simultaneously filed a Verified Petition for Seizure of Property Subject to Forfeiture. Attached to the

petition was a probable cause affidavit sworn by Officer Charles Dennis of the Ft. Wayne Police Department. The affidavit alleged the thirty-nine prior obscenity convictions and related that police officers had observed materials believed to be obscene during recent surveillance of the bookstores. Also submitted to the court were taped descriptions by police officers of the contents of the materials.

That same day the court entered an *ex parte* order allowing the Ft. Wayne Police Department to seize the contents of the three bookstores. On March 23 appellants moved to vacate the order and in the alternative sought a modification of the order which would allow them to continue the sale and distribution of the materials in the bookstores. Those motions were premised on appellants' allegation that the order constituted a constitutionally impermissible prior restraint. The motions were denied on March 29.

After police officers on April 3 hauled away the contents of the bookstores, appellants filed an Emergency Motion for Inventory of Property Removed and/or Return of Property. That motion was also denied. On April 18 the trial court certified two questions for interlocutory appeal: 1) whether an application for seizure upon probable cause shown *ex parte* as provided by Ind. Code § 34-4-30.5-3(b) violates due process guarantees provided by the Indiana and United States Constitutions; and 2) whether the seizure order, which is based upon prior criminal convictions, is a violation of the First Amendment.

Thus these cases are similar, with several important factual distinctions. In the Marion County case, the predicate obscenity violations were shown by the allegations of

the investigating officers, while in the Ft. Wayne case the predicate violations underlying the RICO allegation were shown by proof of prior convictions for violations of the Indiana obscenity statute. The two existing Marion County bookstores were permitted to continue operating pending trial and the unopened store was sealed. The Court of Appeals issued a stay order allowing the store to open. The three bookstores in Ft. Wayne were sealed and the contents were hauled away by the police. Those stores remain closed.

Upon consolidating the two cases, the Court of Appeals determined that its disposition of the interlocutory appeals "require[d] resolution of but a single issue: whether the RICO and CRRA provisions invoked against the defendants abridge the freedoms of speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution." *4447 Corp., supra* at 583. The court concluded that:

> "[T]he challenged RICO/CRRA provisions are unconstitutional on three distinct yet interrelated grounds. First, they operate as a prior restraint which impermissibly impinges upon the dissemination of protected materials. Second, these measures fail to comply with the procedural safeguards required even for the suppression of *obscene* materials. Finally, independent of our determination that these statutes operate as an unconstitutional prior restraint, their provisions as they relate to obscenity must fall under the less restrictive means test announced in *United States v. O'Brien* (1968), 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, for the evaluation of allegedly content-neutral state regulation which has an incidental impact upon free expression." *Id.* at 585 (original emphasis).

Before addressing the questions certified for interlocutory appeal, we must analyze the issue found by the

Court of Appeals to be dispositive, namely whether the RICO/CRRA tatutory scheme as it pertains to the predicate offense of obscenity violates the First and Fourteenth Amendments to the United States Constitution. That analysis begins with the proposition that an act of the legislature must be afforded a presumption of constitutionality. *Ruge v. Kovach* (1984), Ind., 467 N.E.2d 673; *Johnson v. St. Vincent Hospital, Inc.* (1980), 273 Ind. 374, 404 N.E.2d 585.

Appellees argue the purpose of the CRRA remedies is not to suppress speech but rather to compel the forfeiture of assets acquired through racketeering activity; therefore, their actions were not undertaken in an effort to enjoin or restrain any future display or distribution of presumptively protected expressive material. Appellees assert that since any personal property, regardless of its nature, which is derived from racketeering activity could possibly be seized, the seizure orders were not entered because appellants' assets were obscene materials but because there was probable cause to believe they were assets subject to forfeiture.

Appellants contend that the statutory scheme must be analyzed in terms of its effect upon the exercise of First Amendment rights, and in so doing the only conclusion that can be reached is that the statutes as applied to the predicate offense of obscenity constitute an impermissible prior restraint. Appellants would have us adopt the Court of Appeals' view "that for constitutional purposes, these proceedings must be viewed as the functional equivalent of a nuisance or obscenity action," *4447 Corp., supra* at 597, and cite a number of cases involving state actions

found to constitute prior restraints. *See, e.g., Entertainment Concepts, Inc., III v. Maciejewski* (7th Cir. 1980), 631 F.2d 497 (license revocation); *Universal Amusement Co., Inc. v. Vance* (5th Cir. 1978), 587 F.2d 159 (nuisance abatement), *aff'd.* (1980), 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413; *State ex rel. Blee v. Mohney Enterprises* (1972), 154 Ind.App. 244, 289 N.E.2d 519 (injunction).

To appellants, the word "racketeering" as applied in this context is merely a semantic device to allow the state to "expand its arsenal of weapons designed to suppress obscenity" to include license revocation, padlocking, forfeiture of property used to disseminate obscene matter and similar methods which the courts have historically condemned; consequently, the CRRA remedies constitute a restraint on future expression. We cannot agree.

The purpose of the federal RICO statute, after which the Indiana statute was patterned, is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States* (1983), 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.Ed.2d 17, 26. Its provisions are to be liberally construed to effectuate its remedial purposes. *United States v. Turkette* (1981), 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246. One of the most important of those remedies is the forfeiture of assets acquired through racketeering activity. *Russello, supra.*

Both the federal and Indiana RICO statutes delineate predicate offenses which underlie an allegation of a pattern of racketeering activity. The Indiana RICO statute as originally enacted included obscenity violations as a predicate offense. While the federal RICO statute did

not initially contain the predicate offense of obscenity violations, in 1984 Congress amended the statute to include as a predicate offense "any act . . . involving . . . dealing in obscene matter . . . which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C.A. § 1961(1)(A) (West Supp. 1986). The statute was further amended to include "any act which is indictable under . . . title 18, United States Code . . . sections 1461-1465 (relating to obscene matter)." 18 U.S.C.A. § 1961(1)(B) (West Supp. 1986).

Given the clear legislative purpose in enacting these anti-racketeering statutes, that purpose, in the context of alleged obscenity violations, cannot be specifically construed to represent an attempt to restrain the sale or distribution of expressive materials. The legislative attack on racketeering activity is not, as appellants contend, merely a semantic device intended to circumvent well-established First Amendment doctrine.

Obscenity does not come within the area of constitutionally protected speech or press. *Miller v. California* (1973), 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419; *Roth v. United States* (1957), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. Our legislature, as has Congress, has determined that obscenity violations should be one of the underlying offenses which may constitute racketeering activity as defined in the RICO statute. We must take heed of that legislative intent.

We believe the overall purpose of the RICO statute is as applicable to obscenity violations as it is to the other enumerated predicate offenses which have no conceivable First Amendment ramifications. Thus we cannot agree

with either appellants or the Court of Appeals that the purpose of the Indiana RICO/CRRA scheme, as it pertains to the predicate offense of obscenity, is to restrain the sale or distribution of expressive materials. It is irrelevant whether assets acquired through racketeering activity are obscene or not. They are subject to forfeiture if the elements of a pattern of racketeering activity are shown. The other CRRA remedies, such as license revocation, are also available regardless of the nature of the racketeering enterprise.

There is a dearth of caselaw concerning RICO-based forfeiture of expressive materials. Appellees rely primarily on *Western Business Systems, Inc. v. Slaton* (N.D. Ga. 1980), 492 F.Supp. 513, a case in which the plaintiffs sought a preliminary injunction in an attempt to prohibit prospectively RICO prosecutions based on the predicate crime of obscenity. The plaintiffs asserted that "the statute constitutes a prior restraint on First Amendment freedoms by allowing certain presumptively protected materials to be forfeited to the state." *Id.* at 514.

The court denied the motion for a preliminary injunction. After reserving ruling on the defendants' contention that the plaintiffs were not proper parties to bring the suit, *Id.*, the court found that the plaintiffs had not shown any significant infringement of First Amendment rights, were not in substantial need of protection, had shown no threat of irreparable harm from enforcement of the statute and had "shown little likelihood of eventual success on the merits of their constitutional attack on the Georgia RICO Act." *Id.* at 515.

In its opinion the court focused primarily on the plaintiffs' argument that the statute allows for the forfeiture

of printed matter on the basis that it is probably obscene. According to the court, their "attempted reading does great violence to the words of the statute." *Id.* at 514.

> "As the court reads the statute, Ga.Code § 26-3403 prohibits the acquisition even of legitimate businesses with the proceeds of racketeering (as defined). Under § 26-3405 all property, of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds, is subject to forfeiture to the state. These chattels might be anything from gardening equipment to cook books, and might also be sexually explicit materials. Forfeiture could apply to any chattel whatever, if it was acquired with the proceeds of racketeering. Thus, if the items seized are books or movie films, the seizure is totally unrelated to their contents. They would be forfeited under the statute not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime.
>
> "Similarly, the law enforcement officer authorized by § 26-3405(d)(2) to seize materials prior to the filing of a complaint, would be seizing them upon probable cause to believe that they were subject to forfeiture, and not—as plaintiffs argue—upon his personal judgment that the objects are obscene. We must keep in mind that these objects may be anything." *Id.*

We agree with court's reasoning that the purpose of the forfeiture provisions is totally unrelated to the nature of the assets in question. The overall purpose of the anti-racketeering law is unequivocal, even where the predicate offense alleged is a violation of the obscenity statute. The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity.

Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene.

Underlying the Court of Appeals' opinion was its fear that "these civil remedies invite indiscriminate prosecution." *4447 Corp., supra* at 592. Believing the "draconian" RICO/CRRA statutes to be "prone to abuse given the relative ease with which the state may invoke their sanctions," *Id.*, the court posited that "[t]he potency of the prosecutorial weapon and the threat it poses to the legitimate exercise of First Amendment freedoms obviously exceed the bounds of constitutionally permissible regulation." *Id.* at 601-02.

We do not share the Court of Appeals' fears that prosecutors will abuse the CRRA remedies and that allowing the seizure and/or forfeiture of assets such as those at issue here will lead to the breakdown of the protections the First Amendment undeniably affords to various forms of expression. It cannot be presumed that prosecutorial discretion will be abused to the extent of threatening "the continued existence of bookstores and theaters." *See Id.* at 601. The remedies provided in the CRRA are a legitimate tool in the attack on racketeering activity. To find otherwise would thwart the legislative intent apparent in the inclusion of obscenity as a predicate offense for a showing of a pattern of racketeering activity and would allow those engaged in racketeering activity to effectively shield their proceeds so gained behind a pseudo-constitutional barrier.

In sum, these actions seeking various CRRA remedies were instituted in an attempt to compel the forfeiture of

the proceeds of alleged racketeering activity and not to restrain the future distribution of expressive materials. We hold that the RICO/CRRA statutes as they pertain to the predicate offense of obscenity do not violate the First and Fourteenth Amendments of the United States Constitution.

We now address the issues certified by the respective trial courts for interlocutory appeal. In the Marion County case, the issue is whether a seizure order could be based on alleged obscenity violations not yet litigated.

There are no reported Indiana cases directly confronting the question of whether prior convictions for the predicate offenses are necessary to sustain a conviction for Corrupt Business Influence under Ind. Code § 35-45-6-2. In *Alvers, supra* at 85, the Court of Appeals stated in its recitation of the facts that the defendant "was charged with seven specific acts of two basic types—receiving stolen property and substituting cubic zirconias for diamonds in jewelry that was submitted for repairs, thereby evidencing a pattern of racketeering activity." While it can be implied that there were no convictions for the acts underlying the allegation of racketeering activity, the issue of whether those acts could provide in part the basis for the conviction was not raised on appeal.

Under the federal RICO statute, convictions for the predicate offenses are not required. *Sedima, S.P.R.L. v. Imrex Co.* (1985), 473 U.S. —, 105 S.Ct. 3275, 87 L.Ed.2d 346; *United States v. Malatesta* (5th Cir. 1978), 583 F.2d 748, *cert. denied* (1979), 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59. Nowhere in Ind. Code § 35-45-6-1, which de-

fines "racketeering activity" and "pattern of racketeering activity," is there reference to the word conviction. *See Sedima, supra.* The statute speaks only of committing a "violation" of any of the enumerated predicate offenses.

Had the legislature intended to require convictions for the predicate offenses, it would have so worded the statute. Consequently, we hold that prior convictions for the underlying offenses are not required to prove a pattern of racketeering activity under Ind. Code § 35-45-6-2.

Appellants make light of the construction of the Indiana RICO statute advanced by the office of the Indiana Attorney General in *J.N.S., Inc. v. State of Indiana* (7th Cir. 1983), 712 F.2d 303, in which the court affirmed the dismissal on standing grounds of the plaintiffs' complaint seeking a declaratory judgment regarding the constitutionality of the Indiana RICO statute as applied to obscenity. As stated by the court, "[w]hile our research discloses no Indiana cases construing the requirement of two 'violations,' at oral argument, a deputy attorney general opined that J.N.S. would have to accumulate two obscenity *convictions* before the state RICO statutes would apply." *Id.* at 306 (original emphasis). That opinion is not binding on this Court, and in any event there is no basis from which to conclude it is a proper construction of the Indiana RICO statute.

The Marion Circuit Court entered its *ex parte* seizure order upon a showing of probable cause to believe a violation of the RICO statute involving the property in question had occurred. As we construe the RICO statute, a showing of prior convictions for the alleged obscenity violations was not required. In order to prevail in the forfeiture action, appellee Goldsmith will of course have to show the existence of the obscenity violations in order to prove a violation of Ind. Code § 35-45-6-2 has occurred. It is at trial on the forfeiture and other requested CRRA remedies that the question of whether the materials are obscene will be litigated. A final determination of that question was not necessary at the hearing on the petition for seizure.

The trial court in the Ft. Wayne case certified two questions: 1) whether the application for seizure violates due process; and 2) whether the order constitutes a violation of the First Amendment. As to the latter question, we have above held that the RICO/CRRA statutory scheme as applied to the predicate offense of obscenity does not violate the First and Fourteenth Amendments. We accordingly find the seizure order does not constitute a prior restraint or in any other manner impinge upon appellants' rights under those amendments.

Concerning the former question, which was not addressed by the Court of Appeals in the majority opinion, we interpret the trial court's inquiry to be whether, in light of procedural due process guarantees, the appellants can be deprived of their property, without an adversary hearing, pending trial on the forfeiture action. Ind. Code § 34-4-30.5-3(b) clearly allows, upon the filing of a forfeiture action under Ind. Code § 34-4-30.5-3(a), for the entry of an order seizing property allegedly subject to forfeiture upon a showing of probable cause to believe a violation of the RICO statute involving the property in question has occurred.

The Marion Circuit Court, although not required to do so by Ind. Code § 34-4-30.5-3, *sua sponte* set trial for 72 hours after the entry of its seizure order. The Allen Circuit Court did not set a trial date after entering the *ex parte* seizure order; nevertheless, we find that the setting of a trial date within such a brief period is not required to guarantee the due process rights of appellants.

At the point a seizure order is entered there has been a judicial determination that there is probable cause to believe a violation of Ind. Code § 35-45-6-2 involving the property has occurred. The reason for an adversary hearing on the seizure of the property would be to determine whether the property had been unlawfully seized. Generally, a defendant would initiate such action by the filing of a motion to vacate the seizure order, as was done in the instant cases, and we would expect the court to hold a prompt adversarial hearing on such a motion. If no motion to vacate is filed, or if the motion is denied, there will be a full adversarial hearing on the merits of the forfeiture action. Although Ind. Code § 34-4-30.5-3(a) does not specifically provide a time frame for that hearing, we would interpret the statute to require the hearing on the question of forfeitu[illegible] be held within a reasonable time.

Thus a defendant whose property has been seized pursuant to Ind. Code § 34-4-30.5-3(b) is afforded due process by a prompt adversarial hearing on a motion to vacate the seizure order and/or by a hearing on the ques- of forfeiture held within a reasonable time after the CRRA complaint and petition for seizure have been filed. In

the instant case, appellants were afforded a hearing on their motions to dismiss the complaints and to vacate the seizure orders. Because the proceedings were halted by the filing of the interlocutory appeals, there has been no opportunity for trials on the merits of the CRRA complaints. At this stage we can discern no violation of appellants' due process rights.

Transfer is granted and the opinion of the Court of Appeals is vacated. The causes are remanded for further proceedings not inconsistent with this opinion.

GIVAN, C.J.
Pivarnik and Dickson, JJ., concur.
Shepard, J., concurs in result with respect to 4447 Corporation v. Goldsmith and dissents with respect to Fort Wayne Books v. State.
DeBruler, J., dissents with separate opinion.

IN THE
SUPREME COURT OF INDIANA

4447 CORPORATION, et al.,	)	
	)	
Appellants,	)	NO. 4-1283 A 415
v.	)	
	)	COURT OF
STEVEN GOLDSMITH,	)	APPEALS
	)	
Appellee.	)	NO. 29S04-8703-
v.	)	CV-270
	)	SUPREME
FORT WAYNE BOOKS, INC., et al.,	)	COURT
	)	
Appellants,	)	(Filed
v.	)	March 2, 1987)
	)	
STATE OF INDIANA AND STEPHEN M. SIMS,	)	
	)	
Appellees.	)	

INTERLOCUTORY APPEAL FROM HAMILTON
CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
Cause No. C83-346

and

INTERLOCUTORY APPEAL FROM ALLEN
CIRCUIT COURT
The Honorable Thomas L. Ryan, Judge
Cause No. CC-84-446

DeBRULER, J.—Dissenting

I am in agreement with the thoughtful and thorough opinion of Judge Young of the Fourth District. *4447 Corporation v. Goldsmith* (1985) Ind. App., 479 N.E.2d. 578.

I will surface portions of that opinion in order to re-emphasize the important points.

The majority summarizes with approval appellees' contention that . . . "the purpose of the CRRA remedies is not to suppress speech but rather to compel the forfeiture of assets acquired through racketeering activity" and that . . . "the seizure orders were not entered because appellants' assets were obscene materials but because there was probable cause to believe they were assets subject to forfeiture."

The majority intimates that the challenged legislative scheme here is a legitimate and rational response to the problem of racketeering activity and that the potential impact of the forfeiture on presumptively constitutionally protected expressive materials is irrelevant. Therefore, the majority holds under this relaxed standard of review, that the challenged legislative scheme passes constitutional muster.

The majority opinion misses the mark.

> Supreme Court decisions clearly direct, however, that in cases of this order, "the standard of review is determined by the *nature of the right assertedly threatened or violated* rather than by the power being exercised or the specific limitation imposed." *Schad v. Borough of Mount Ephraim* (1981), 452 U.S. 61, 68, 101 S.Ct. 2176, 2182, 68 L.Ed. 671. [Emphasis added].

4447 Corporation v. Goldsmith, supra at 583.

Here, the nature of the right assertedly threatened is appellants' First Amendment Right to sell books: books which until adjudged obscene, an unprotected category of speech, are constitutionally protected.

> "Given the assertion of this right, we are not free to accept uncritically the state's characterization of the padlocking of bookstores and the seizure of their contents as neutral incidents of a campaign against "racketeering", *but rather must subject the state regulation to searching and realistic scrutiny.*" [Emphasis added]

4447 Corporation v. Goldsmith, supra at 584.

Under the circumstances of these cases, a searching and realistic scrutinization reveals that the challenged legislative scheme operates as an unconstitutional prior restraint of speech. As employed by both prosecutors, once a person is found to have engaged more than once in an open retail sale of unprotected speech, he forfeits his rights in protected speech. Such a perfunctory scheme resulting in an entire shutdown is clearly an unconstitutional prior restraint on future protected conduct.

APPENDIX B

IN THE
SUPREME COURT OF INDIANA

4447 CORPORATION, et al.,	)	
	)	
Appellants,	)	
	)	
-v-	)	
	)	
STEPHEN GOLDSMITH,	)	
	)	
Appellee.	)	CAUSE NO.
	)	4-1282 A 415 in the
	)	Court of Appeals
	)	
FORT WAYNE BOOKS, INC., et al.,	)	CAUSE NO.
	)	29S04-8703-CV-
Appellants,	)	270 in the Indiana
	)	Supreme Court
-v-	)	
	)	
STATE OF INDIANA and STEPHEN M. SIMS,	)	
	)	
Appellees.	)	

ORDER

DENYING "PETITION FOR STAY OF EXECUTION IN CONNECTION WITH PETITION FOR CERTIORARI".

COMES NOW the Petitioner, Burke Mendenhall, by counsel, Bernard L. Pylitt, and files his "Petition for Stay of Execution in Connection With Petition for Certiorari", alleging as follows:

1. That this cause was initially brought in the Marion County Circuit Court by the Marion County Prosecuting Attorney, Stephen Goldsmith, alleging that the Petitioner, Mendenhall, owned the real estate

at 4266 West 38th Street, Indianapolis, Indiana where an adult bookstore was engaged in racketeering activities as defined in the Indiana Racketeering Influence and Corrupt Organizations Act ("RICO"), Indiana Code 35-45-6-1 *et seq.*

2. On August 1, 1983, the Marion County Circuit Court, The Honorable Anthony J. Metz, Judge Pro Tem presiding, in Cause No. C83-1788, issued Findings of Fact and an Order declaring the property owned by the Petitioner, Mendenhall, at 4266 West 38th Street, Indianapolis, Indiana was subject to forfeiture under the remedies section provided in the Civil Remedies for Racketeering Activities ("CRRA"), Indiana Code 34-4-30.5.1 *et seq* (hereinafter referred to as the "Forfeiture Order").

3. After a change of venue from Marion County, the Hamilton County Circuit Court entered an Order on November 21, 1983 overruling a Motion of a co-defendant, Burton Gorelick, to vacate the Forfeiture Order, which ruling was then appealed to the Indiana Court of Appeals as an Interlocutory Appeal in Consolidated Cause No. 4-1284 A 415 in the Indiana Court of Appeals, Fourth District.

4. On February 2, 1984, Chief Judge Paul H. Buchanan, Jr., Court of Appeals of Indiana, entered an Order upon Interlocutory Appeal modifying the Forfeiture Order of the Marion County Circuit Court dated August 1, 1983, pending the appeal of that matter to the Indiana Court of Appeals. A copy of that Order is attached hereto as Exhibit "A".

5. The Indiana Court of Appeals for the Fourth District in *4447 Corp. v. Goldsmith* (1985), Ind.App. 479 N.E.2d 578, 592 held that the Civil RICO and CRRA statutes at issue constituted facially unconstitional prior restraints in their application to the predicate offense of obscenity.

6. On March 2, 1987, this Court granted a Petition for Transfer and vacated the Opinion of the In-

diana Court of Appeals, and remanded the matter to the Hamilton County Circuit Court for further proceedings not inconsistent with that Opinion.

7. Subsequent to the decision of the Supreme Court of Indiana, the Honorable James E. Noland, Judge, United States District Court for the Southern District of Indiana, in an unrelated criminal matter on June 5, 1987, under Cause Number IP86-20-CR-01 entered an Amended Judgment and Order of Forfeiture in the case captioned *United States of America vs. Burton Gorelick* directing Gorelick to vacate the premises at 4266 West 38th Street, Indianapolis, Indiana and cease business operations at the Plaza Entertainment Center on or before March 2, 1987.

8. From on or about March 2, 1987, to and including August 3, 1987, the premises remained vacant at 4266 West 38th Street, Indianapolis, Indiana.

9. On or about August 3, 1987, a new business entity began business at the location of 4266 West 38th Street, Indianapolis, Indiana.

10. On or about August 6, 1987, members of the Indianapolis Police Department, under the direction of the Marion County Prosecuting Attorney's Office, padlocked the subsequent business operation located at 4266 West 38th Street, Indianapolis, Indiana, allegedly under the authority of the August 1, 1983 Order of the Marion County Circuit Court in this matter, and the November 21, 1983 Entry of the Hamilton County Circuit Court, overruling the defense Motion Vacate the Order of August 1, 1983.

11. On August 13, 1987, Deborah Daniels, Marion County Prosecuting Attorney's Office, advised the undersigned that the new business located at 4266 West 38th Street, Indianapolis, Indiana, was closed under the authority of the August 1, 1983 Order and the November 21, 1983 Entry of the Hamilton County Circuit Court.

12. That the jurisdiction of the Supreme Court of the United States to review this case and petition for certiorari rests upon 28 U.S.C. Section 1257(3), and that the jurisdiction of this Court to issue the stay request is granted by 28 U.S.C. Section 2101(f).

13. That this Court denied Appellant's Petition for Rehearing on June 18, 1987.

14. The Appellant-Petitioner has retained counsel who is in the process of preparing his Petition for Writ of Certiorari to the United States Supreme Court which will be on the merits and will be filed within the proper time requirements as provided for by the Rules of the United States Supreme Court.

15. The reason for applying for a stay of the Order entered by the Marion County Circuit Court, The Honorable Anthony J. Metz, Judge Pro Tem presiding, in Cause No. C83-1788 and the Order of this Court rendered on March 2, 1987 in this matter is that this Court's decision raises an important constitutional question involving the taking of Petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and the denial of this federal right is the result of a finding by the courts below and is shown by the record to be without evidence to support it.

16. That unless a stay of the Order entered by the Marion County Circuit Court, The Honorable Anthony J. Metz, Judge Pro Tem presiding, in Cause No. C83-1788 and the Order of this Court rendered on March 2, 1987 in this matter is granted, Petitioner, Mendenhall, will be irreparably injured in that he is being denied the right to collect rents from a new business tenant without the benefit of any judicial determination and/or order, and that he will be irreparably injured during the pendency of the case in the Supreme Court of the United States.

THIS COURT, BEING DULY ADVISED IN THE PREMISES, now DENIES the "Petition for Stay of Execution in Connection with Petition for Certiorari", as this Court is without jurisdiction over this matter.

The Clerk of this Court is directed to send a copy of this Order to all counsel of Record.

DONE AT INDIANAPOLIS, INDIANA this 2nd day of September, 1987.

/s/ Randall T. Shepard
RANDALL T. SHEPARD
Chief Justice of Indiana

APPENDIX C

IN THE
COURT OF APPEALS OF INDIANA
FOURTH DISTRICT

4447 CORPORATION, WORLD VIDEO SYSTEMS, ISSI THEATRE CORPORATION, PLAZA ENTERTAINMENT CENTER and BURTON GORELICK,	)	
Appellants-Defendants,	)	
-v-	)	Consolidated Cause No. 4-1283 A 415
STEPHEN GOLDSMITH, Prosecuting Attorney for the Nineteenth Judicial Circuit,	)	
Appellee-Plaintiff.	)	

FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., and EROTIC HOUSE BOOKSTORE, INC.,	)	
Appellants-Defendants,	)	
-v-	)	[No. 3-484 A 106 Before Consolidation]
STATE OF INDIANA and STEPHEN M. SIMS, Prosecuting Attorney for the Thirty-Eighth Judicial Circuit,	)	
Appellees-Plaintiffs.	)	

INTERLOCUTORY APPEAL FROM THE
HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge

and

INTERLOCUTORY APPEAL FROM THE
ALLEN CIRCUIT COURT
The Honorable Thomas L. Ryan, Judge

YOUNG, J.

In each of these cases, the state has instituted proceedings against adult bookstores under the Racketeer Influenced and Corrupt Organizations Act (RICO), IND. CODE 35-45-6-1 *et seq.*, seeking remedies available under the Civil Remedies for Racketeering Activity (CRRA) statute, IND. CODE 34-4-30.5-1 *et seq.* The defendants bring interlocutory appeals from the trial courts' denials of their motions to vacate injunctive orders providing for, *inter alia*, the padlocking of bookstores and seizure of the contents thereof. We have consolidated these appeals in order to consider defendants' common challenge to the constitutionality of the RICO and CRRA statutes under the First Amendment in the United States Constitution.

Marion County Prosecutor Stephen Goldsmith initiated the first of these actions on August 1, 1983, when he filed a complaint in the Marion Circuit Court against the individual and corporate defendants, owners and operators of three adult bookstores. The complaint alleged that the bookstores constituted "an illegal enterprise"[1] and that

1. IC 35-45-6-1 defines "enterprise" to include a "sole proprietorship, corporation, partnership, business trust," etc.

the defendants had engaged in "a pattern of racketeering activity"[2] in violation of IC 35-45-6-1 *et seq.* These RICO provisions create an offense of "corrupt business influence," a Class C felony, committed by a person:

> (1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;
>
> (2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or
>
> (3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; . . . .

IC 35-45-6-2. The statute enumerates various predicate offenses which constitute "racketeering activity," including obscenity violations under IND. CODE 35-30-10.1-2 (repealed 1983 Acts, P.L. 311; *see now* IND. CODE 35-49-3-1).

Goldsmith in his complaint sought civil remedies created by the Civil Remedies for Racketeering Activity

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2. The RICO statute defines a "pattern of racketeering activity" as:

> engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity. IC 35-45-6-1.

Act. Under IC 34-4-30.5-2, which provides for injunctive relief in response to RICO violations, the trial court, upon a finding by a preponderance of the evidence that a RICO violation has occurred may:

> (1) order a defendant to divest himself of any interest in any enterprise or real property;
>
> (2) impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;
>
> (3) order the dissolution or reorganization of any enterprise;
>
> (4) order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;
>
> (5) order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and
>
> (6) make any other order or judgment that the court considers appropriate.

The CRRA statute further authorizes the prosecuting attorney to seek forfeiture of property incident to corrupt business influence, and to obtain a court order seizing property subject to forfeiture, under IC 34-4-30.5-3:

> (a) The prosecuting attorney in a county in which any of the property is located, may bring an

action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred.

Pursuant to this authority, Goldsmith filed along with his complaint a Petition for Seizure of Property Subject to Forfeiture, incorporating by reference the allegations of the complaint and of the probable cause affidavit. This petition alleged that the defendants intended soon to open an additional adult bookstore in furtherance of their "racketeering activity", i.e. "dissemination of obscene material." The petition also asserted that the new bookstore contained numerous obscene items, none of which were specified, and cited possession of these allegedly obscene materials as probable cause to establish RICO violations.

The probable cause affidavit upon which this petition for seizure relied stated that police had visited the two

operating adult bookstores, where they observed sexually-oriented books, magazines, films and videotapes. They purchased four sexually-explicit movies, which they submitted to the court. Visiting the construction site of the soon-to-open bookstore, they were informed that sexually-oriented materials would be available there as well. The police further alleged that the three bookstores constituted a single enterprise under common ownership and control.

On the basis of these allegations, the trial court at the *ex parte* proceedings of August 1, 1983, issued an order that police seize, i.e. padlock, the third bookstore in advance of its opening, as authorized by IC 34-4-30.5-4.[3] While this

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3. This CRRA section specifies the procedures for seizure of property pursuant to IC 34-4-30.5-3 and related RICO provisions:

> (a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. . . .
>
> (b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:
>
> (1) place the property under seal;
>
> (2) remove the property to a place designated by the court; or
>
> (3) require another agency authorized by law to take custody of the property and remove it to an appropriate location.
>
> (c) Property seized under subsection (a) is not subject to repleven [sic], but is considered to be in the custody of the law enforcement officer making the seizure, subject only to order of the court. However, if a seizure of property is made in accordance with subsection (a), the prosecuting attorney shall promptly bring an action for forfeiture under section 3 of this chapter. If an action is not filed within 180 days after the date of the seizure, the law enforcement agency whose officer made the seizure shall return the property to its owner.

order permitted the continued distribution of literature and films at the two existing bookstores, it required the defendants to list and preserve all other property pending trial. On August 4, 1983, the defendants appeared and filed motions to dismiss the complaint and to vacate the trial court's order.

Goldsmith on September 8, 1983, filed an amended complaint in the Hamilton Circuit Court, to which venue of the case had been transferred. Reciting allegations materially the same as those of the original complaint,[4] plain-

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4. Neither the original nor the amended complaint alleges prior obscenity convictions of these defendants. This fact raises a serious question whether appellees have stated a cause of action in the case of 4447 Corporation, et al., as the Indiana Attorney General has previously taken the position, in *J.N.S., Inc. v. State of Indiana* (7th Cir. 1983), 712 F.2d 303, that the RICO statute may not be applied to obscenity offenses in the absence of two prior obscenity *convictions*.

In *J.N.S.*, the plaintiff sought a declaratory judgment regarding the constitutionality of the Indiana RICO statute as applied to obscenity, although it had not been charged with violation of that statute. The Court of Appeals affirmed dismissal of the complaint on grounds of non-justiciability. The Court concluded that because J.N.S. had twice been charged but had not yet been convicted of obscenity violations, it had not suffered sufficient actual or threatened injury to present a "case or controversy" as constitutionally required under Article III. In reaching this conclusion, the Court relied in part upon the construction of the RICO statute advanced by the Indiana Attorney General's office:

> While our research discloses no Indiana cases construing the requirement of two 'violations', at oral argument, a deputy attorney general opined that J.N.S. would have to accumulate two obscenity *convictions* before the state RICO statutes would apply. 712 F.2d at 306.

Because this consolidated appeal requires our determination of the underlying constitutional question, we need not address this issue. We note the merits of appellants' contention, however, as the requirements of due process, in addition to the chilling effect of a contrary reading of the statute as applied to obscenity, would almost certainly render it constitutionally infirm even if the statute were otherwise constitutional.

tiff prayed for a panoply of CRRA remedies, including license suspension, corporate charter revocation, and forfeiture of all property related to the operation of these bookstores.

On December 21, 1983, the Hamilton Circuit Court denied defendants' Motion to Dismiss the complaint and to vacate the order of the Marion Circuit Court. This court has granted a stay of that order pending appeal of the denial of defendants' motion to vacate.

In *Fort Wayne Books*, et al., Allen County Prosecutor Stephen Sims has initiated a similar civil action against the owners and operators of three adult bookstores. As in the *4447* case, the complaint alleges an illegal enterprise, the purpose of which is to operate adult bookstores. In this case, the complaint also cites a pattern of racketeering activity consisting of thirty-nine prior obscenity convictions of the three bookstores and their agents between June 1981 and March 19, 1984, the date of the complaint.

Sims in his complaint sought CRRA remedies including license forfeiture and confiscation of defendant's property. The prosecutor accordingly filed a petition for seizure of property, seeking forfeiture of the three bookstores with their entire contents and all corporate assets under IC 34-4-30.5-3.

The forfeiture petition incorporated by reference the allegations of the complaint and the probable cause affidavit. The latter stated that police had been monitoring the activities of the three bookstores and that the defendant corporations and their employees had incurred thirty-nine obscenity convictions. The affiant related that he and other police had recently visited the bookstores, where they observed materials he believed to be obscene.

At an *ex parte* hearing held the same day the complaint was filed, the trial court merely reviewed these documents and heard taped descriptions by police of the contents of seized materials. On this basis, the prosecutor obtained an order directing the sheriff to padlock all three bookstores and to seize their contents.

Noting that this order constituted a constitutionally impermissible prior restraint, the corporate defendants on March 23, 1984, filed a motion to vacate the trial court's order. In the alternative, they sought to modify its terms to allow the continued sale and distribution of materials including books and motion pictures, for which they invoked the protection of the First Amendment.

One week after defendants filed this motion, however, the police seized and hauled away the entire contents of the three bookstores. The defendants responded with an Emergency Motion for Inventory of Property Removed and/or Return of Property. The trial court denied both of these motions, and from the denial of their motion to vacate or modify the court's order, the corporate defendants appeal.

Our disposition of these interlocutory appeals requires resolution of but a single issue: whether the RICO and CRRA provisions invoked against the defendants abridge the freedoms of speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution.

I.

Because defendants-appellants raise this constitutional challenge, we must employ standards developed by the United States Supreme Court with particular sensitivity to the fundamental role of the freedoms of speech and press

under our constitutional system. The state in the gravamen of its argument essentially urges that we adopt a lesser standard of review, focussing entirely upon the legitimacy of the avowed state purpose of "combatting racketeering" by means of the RICO Act and associated civil remedies. Supreme Court decisions clearly direct, however, that in cases of this order, "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." *Schad v. Borough of Mount Emphraim* (1981), 452 U.S. 61, 68.

Appellants in this case assert their right to distribute and to exhibit materials including books, magazines, and films which have not been adjudged obscene and which therefore presumptively enjoy the protection of the First Amendment. The constitutional guarantee of freedom of the press, appellants rightly contend, embraces the circulation of books as well as their publication. *Bantam Books, Inc. v. Sullivan* (1963), 372 U.S. 58. Specifically, appellants invoke their well-recognized right to freedom from prior restraint of such communicative activity. Given the assertion of this right, we are not free to accept uncritically the state's characterization of the padlocking of bookstores and the seizure of their contents as neutral incidents of a campaign against "racketeering", but rather must subject the state regulation to searching and realistic scrutiny.

The communicative freedoms guaranteed by the First Amendment have long been deemed a "transcendent value" of our constitutional system. *Speiser v. Randall* (1958), 357 U.S. 513, 526. The rationale for treating certain constitutional guarantees as "preferred freedoms" was initially suggested by Justice Stone in his celebrated footnote 4 to

his opinion in *United States v. Carolene Products Co.* (1938), 304 U.S. 144, 152-53, intimating that legislation directly contravening a constitutional prohibition, such as those of the Bill of Rights, may "be subjected to more exacting judicial scrutiny . . . than are most other types of legislation. . . ." A few years later in *Murdock v. Pennsylvania* (1943), 319 U.S. 105, 115, the Court explicitly declared: "Freedom of press, freedom of speech, freedom of religion are in a preferred position." Justice Frankfurter, concurring in *Kovacs v. Cooper* (1949), 336 U.S. 77, 90, eloquently expressed the underlying rationale for this principle:

> . . . without freedom of expression, thought becomes checked and atrophied. Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.

The protection of the First Amendment has not been grudgingly restricted to the realm of political speech but has rather been extended to a wide range of expressive activity. Entertainment in the form of motion pictures, broadcast programs, live performances, etc. as well as political and ideological speech, falls within the ambit of the Amendment. *Schad, supra.* Thus, "the setting of the bookstore or the commercial theater [is] each presumptively under the protection of the First Amendment." *Roaden v. Kentucky* (1973), 413 U.S. 496, 504. Our point of departure, therefore, is a presumption that the defendant bookstores have engaged in legitimate First Amend-

ment activity, and that the materials they purvey represent protected speech. We emphasize in this regard that the courts have been loath to draw sharp distinctions among various types of speech; sexually explicit but not obscene materials are entitled to no less protection than other forms of expression. *J-R Distributors, Inc. v. Eikenberry* (9th Cir. 1984) 725 F.2d 482; *Avalon Cinema Corp. v. Thompson* (8th Cir. 1981), 667 F.2d 659.

The Supreme Court has declared a few narrowly-limited classes of expression, including obscenity, to be entirely outside the protection of the First Amendment. In *Roth v. United States* (1957), 357 U.S. 476, 485, the Court first explicitly held that "obscenity is not within the area of constitutionally protected speech or press." As currently defined by the standards set forth in *Miller v. California* (1973), 413 U.S. 15,[5] obscenity is therefore a legitimate object of state regulation, subject to both civil and criminal sanctions. *Paris Adult Theatre I v. Slaton* (1973), 413 U.S. 49.

Because of the overriding importance of First Amendment freedoms, however, state authority to suppress obscenity is not untrammeled. As the Court in *Miller* cau-

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5. The Court in *Miller* expounded the following test for determining obscenity:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

413 U.S. at 24.

tioned, "State statutes designed to regulate obscene materials must be carefully limited." 413 U.S. at 23-24. A state may constitutionally impose a prior restraint such as an injunction against the future distribution of obscenity, but only as to *particular* items determined to be obscene, and then only under the rigorous procedural guidelines developed in the line of cases culminating in *Freedman v. Maryland* (1965), 380 U.S. 51, and *Vance v. Universal Amusement Co., Inc.* (1980), 445 U.S. 308. The Court has consistently emphasized that the line between protected and unprotected speech is "finely drawn" and requires the use of "sensitive tools" to discern and enforce that boundary. *Speiser v. Randall,* 357 U.S. at 525. Even in the realm of obscenity, therefore, the courts have evinced concern that criminal and civil sanctions imposed for the commercial dissemination of obscene materials not sweep so broadly as to create a "chilling effect" which would curtail the availability of nonobscene literature and films due to apprehension and self-censorship on the part of distributors and exhibitors. See, *e.g., Smith v. California* (1959), 361 U.S. 147; *Bantam Books, supra.*

The great weight of constitutional authority decided under these general precepts leads ineluctably to our conclusion that the challenged RICO/CRRA provisions are unconstitutional on three distinct yet interrelated grounds. First, they operate as a prior restraint which impermissibly impinges upon the dissemination of protected materials. Second, these measures fail to comply with the procedural safeguards required even for the suppression of *obscene* materials. Finally, independent of our determination that these statutes operate as an unconstitutional prior restraint, their provisions as they relate to

obscenity must fall under the less restrictive means test announced in *United States v. O'Brien* (1968), 391 U.S. 367, for the evaluation of allegedly content-neutral state regulation which has an incidental impact upon free expression.

Each of these theories sounds common chords of First Amendment law, and any one of these approaches warrants the conclusion that the RICO/CRRA statutes are facially unconstitutional as they pertain to the predicate offense of obscenity.[6] Although we rely primarily upon our determination that these statutes constitute a patently unconstitutional prior restraint, we elaborate the alternative theories because they reveal additional constitutional defects of the statutes and definitively dispose of arguments raised by the state. We will therefore discuss each of these mutually-reinforcing theories in detail below.

II.

The prohibition against prior restraints of speech and press has always been regarded as the essential core of First Amendment protection. The Court in *Near v. Minnesota* (1931), 283 U.S. 697, 713-14, first employed the prior restraint doctrine to dismiss an injunction against the press, observing that such suppressive measures represent "the essence of censorship." In the recent case of *Nebraska Press Association v. Stuart* (1976), 427 U.S. 539, 559, the Court reiterated, "Prior restraints on speech

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6. For an excellent general formulation of this analysis in a closely related area of First Amendment law, see Trachtman, *Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power,* 58 N.Y.U.L. Rev. 1478 (1983).

and publication are the most serious and the least tolerable infringement on First Amendment rights."

Accordingly, the Court has applied the strictest standard of review to cases involving any prior restraint of expression arguably within the protective ambit of the First Amendment. As a general matter, "Only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms," as the Court has noted in *NAACP v. Button* (1963), 371 U.S. 415, 438; see also *Avalon, supra.* Even a truly compelling state interest justifies regulation only in the manner least restrictive of speech. See, *e.g., Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980), 447 U.S. 557; *Shelton v. Tucker* (1960), 364 U.S. 479.

With regard to prior restraints in particular, the Court has repeatedly asserted, "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books,* 372 U.S. at 70; see also *New York Times v. United States* (1971), 403 U.S. 713, 714; *Near, supra.* The government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe* (1971), 402 U.S. 415, 419; see also *New York Times Co. v. United States, supra.*

This presumption against prior restraints is not absolute; it is subject, however, only to narrowly-delineated exceptions. In *Near,* the Court enumerated "exceptional cases" which might justify restraint in advance of publication, including obscenity. 283 U.S. at 716. Under the subsequent decisions in *Roth* and *Miller,* material ad-

judged to be obscene is by definition unprotected speech and may be restrained prior to distribution. *Paris Adult Theatre I v. Slaton, supra.* The prior restraint doctrine, however, precludes the use of overreaching methods which threaten to curtail protected as well as unprotected speech. Bearing in mind this narrow exception allowing for a governmental ban on obscenity, a constitutional term of art which is not coextensive with sexually-explicit or erotic materials generally, we come inescapably to the conclusion that the obscenity application of the RICO/CRRA statutes renders those provisions fatally overbroad as an unconstitutional prior restraint of protected expression.

We observe initially that the applicability of the prior restraint doctrine to this case is beyond question. "When speech is suppressed in advance of publication or distribution—instead of being permitted to enter the marketplace of ideas before being identified and regulated as unprotected speech—it has been subjected to a prior restraint."[7] This definition perfectly describes the situation before us, in which the state has successfully attempted to padlock bookstores and to seize extensive collections of books, magazines, and films along with the neutral instrumentalities used for their dissemination. Without so much as an allegation of obscenity as to most of the bookstores' inventories of films and publications, the state ultimately seeks permanent revocation of their business licenses as well as forfeiture of these communicative materials and instrumentalities. The impact of such remedies upon the availability of these materials is direct and undeniable—the state has effectively suppressed them prior to dis-

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7. Trachtman, *supra* note 6, at 1493.

tribution. The suppression of entire bookstores inevitably affects protected as well as any unprotected expression, as we must presume absent allegation and proof of the obscenity of each item seized.

Our determination that a prior restraint has been applied to protected speech is virtually dispositive of the present case and extends to the entire range of injunctive and forfeiture remedies available under these statutes. In such a prosecution based upon prior obscenity convictions or the bare allegation of contemporaneous obscenity violations, the application of any one of the enumerated CRRA remedies threatens closure of the defendant bookstores, theaters or similar establishments and therefore poses an impermissible prior restraint.

First, we note the unconstitutionality of the injunctive remedies immediately presented by the trial courts' imposition of seizure orders pursuant to IC 34-4-30.5-3, -4. These sections by their clear terms authorize such a seizure; we thus have no quarrel with the trial courts' implicit interpretation of the RICO/CRRA provisions to allow for this remedy. However, the resulting orders padlocking these bookstores and seizing their contents effectively prevent the circulation of the seized materials and of others which defendants might otherwise disseminate from the premises. This constraint upon the free circulation of presumptively protected materials represents the unconstitutional prior restraint in its most virulent form.

In addition to the injunctive orders seizing defendants' property pending trial, the state seeks as an ultimate remedy the permanent forfeiture of the corporate de-

fendants' real and personal property, including the bookstore premises, their inventories of films and publications, and the instrumentalities involved in the distribution of these materials. Our conclusion regarding the unconstitutionality of the seizure orders applies with even greater force here. A forfeiture remedy extending to presumptively legitimate expression and the facilities used for purposes of such expression is likewise overbroad and therefore facially invalid as a prior restraint.

We are confirmed in this analysis by an earlier decision of this court and by numerous decisions from other jurisdictions, a large majority of which have struck down as impermissible prior restraints similar measures effecting closure of bookstores and theaters on obscenity grounds. Contrary to the state's argument attempting to distinguish these cases, which arise primarily under nuisance and "red light" abatement statutes, we find these decisions precisely analogous to the case before us. Again, we remind the appellees that the vantage point from which we view this constitutional claim is "the nature of the right assertedly threatened or violated rather than . . . the power being exercised or the specific limitation imposed." *Schad,* 452 U.S. at 68.

This court has confronted a similar threat to an adult bookstore defendant's right to freedom from prior restraint in *State ex rel. Blee v. Mohney Enterprises* (1973), 154 Ind. App. 244, 289 N.E.2d 519. In that case, our First District affirmed the trial court's denial of an injunction by which the plaintiff sought on statutory nuisance grounds to restrain an adult bookstore operator from disseminating any printed material whatsoever in the county. Relying pri-

marily upon *Near*, the court noted simply that such an injunction would constitute an impermissible prior restraint of protected communication.

This theme has resounded in most of the numerous state and federal decisions to address the issue in recent years. The Georgia Supreme Court in the representative case of *Sanders v. State* (1974), 231 Ga. 608, 203 S.E.2d 153, struck down a permanent injunction closing an adult bookstore upon a showing of a single prior obscenity violation. The state had invoked its nuisance statute as authorization for this padlock order, a remedy materially identical to the injunctive and forfeiture remedies sought by the state in the present case.

"The problem encountered in applying these laws . . . to justify closing the entire bookstore", the Georgia court began, "is the ancient right of free men to say and print what they wish without prior restraint." 231 Ga. at 611, 203 S.E.2d at 156. After discussing procedural difficulties with the imposition of this sanction, the court continued:

> The injunction closing this store and padlocking it as a public nuisance necessarily halted the future sale and distribution of other printed material which may not be obscene, thereby precluding the application of the above procedural safeguards and creating an unconstitutional restraint upon appellant.

231 Ga. at 613, 203 S.E.2d at 157. In thus concluding that the statute was facially invalid for overbreadth as applied to obscenity violations, the court appealed to underlying First Amendment principles evident also in our foregoing discussion:

> . . . the overly broad coverage contemplated by this statute . . . creates a chilling effect upon the exercise

> of free expression. We cannot throw out the portected to rid ourselves of the unprotected as these laws would require. . . . We must use the deft, the precise and the remedial incision of the surgeon rather than the bludgeoning blow of the butcher to cut away cancerous obscenity. If we do not, the body politic will suffer too mortal a blow from our zeal to have a decent society free of obscene publications but otherwise full of poetry and prose.

231 Ga. at 614, 203 S.E.2d at 157.

Similarly in *General Corporation v. State ex rel. Sweeton* (1975), 294 Ala. 657, 320 So.2d 668, *cert. denied*, 425 U.S. 904 (1976), the Alabama Supreme Court addressed this question, reversing a judgment ordering an adult theater closed for one year pursuant to the State's "red light" abatement act. The court emphasized that "evidence of obscene conduct in the past does not justify enjoining future conduct which is protected by the First Amendment. . . . The padlocking of appellant's operations for one year constitutes prior restraint at its worst and is patently unconstitutional." 294 Ala. at 665-66, 320 So.2d at 675.

In *People ex rel. Busch v. Projection Room Theater* (1976), 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600, *cert. denied*, 429 U.S. 922 (1976), the California Supreme Court tersely disposes of the issue before us, holding that the *Near* doctrine precludes the use of temporary or permanent padlock orders against theaters or bookstores found to have violated obscenity laws:

> We are aware of no reported cases authorizing the closing of a bookstore or theater, even after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene

> . . . .we emphasize that the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution.

17 C.3d at 59, 130 Cal.Rptr. at 338, 550 P.2d at 610.

Other state courts have almost uniformly adopted this position with regard to injunctive remedies allowing the state to close bookstores or theaters. See, *e.g., Mitchem v. State ex rel. Schaub* (1971), Fla., 250 So.2d 883; *Gulf States Theaters of Louisiana v. Richardson* (1973), La., 287 So.2d 480; *State v. A Motion Picture Entitled "The Bet"* (1976), 219 Kan. 64, 547 P.2d 760; *City of Minot v. Central Ave. News, Inc.* (1981), N.D., 308 N.W.2d 851; *State ex rel. Field v. Hess* (1975), Okla., 540 P.2d 1165; *Davis v. Van Emberg* (1975), 464 Pa. 618, 347 A.2d 712; *New Riviera Arts Theatre v. Davis* (1967), 219 Tenn. 652, 412 S.W.2d 890.

Noteworthy federal decisions on this point include *Spokane Arcades, Inc. v. Brockett* (9th Cir. 1980), 631 F.2d 135, *aff'd. mem.* 454 U.S. 1022 (1981), *Universal Amusement Co., Inc. v. Vance* (5th Cir. 1978), 587 F.2d 159, *aff'd.* on procedural grounds, 445 U.S. 308 (1980), and *Nihiser v. Sendak* (N.D. Ind. 1974), 405 F.Supp. 482, *aff'd.*, 431 U.S. 961 (1977). In *Spokane Arcades,* the court declared Washington's moral nuisance abatement statute unconstitutional because of provisions permitting a court to issue temporary and permanent injunctions and temporary closure orders against businesses which may have distributed obscene materials. Similarly, the *en banc* panel

in *Vance* indicated that the application of Texas nuisance statutes to permit the state to obtain blanket injunctions against the future exhibition of unnamed obscene films would operate as an unconstitutional prior restraint. The court also indicated that a padlock order against the premises where such films had been shown would be likewise unconstitutional:

> The statutes allow the state to close, for one year, a theatre that has exhibited obscene films. Unless a bond . . . is posted, the showing of *any* motion picture is punishable by contempt of court. Thus, future conduct that may fall within the purview of the First Amendment is absolutely prohibited after a finding of unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in the landmark case of *Near v. Minnesota* . . . .

587 F.2d at 165.

In *Nihiser,* the court held unconstitutional the former Indiana pornographic nuisance statute, IND. CODE 35-30-10.5 (repealed 1983 Acts, P.L. 311), on grounds that it authorized the state to close a bookstore or theater for one year as a consequence of the past sale or exhibition of obscenity. Condemning this padlock sanction as a prior restraint, the court in *Nihiser* also struck down the act's provision authorizing the removal of personal property from the premises declared to constitute a nuisance, observing that "the state has no right to seize and destroy protected materials" such as projection equipment, films, and publications. 405 F.Supp. at 495-96.

As this latter holding of *Nihiser* indicates, the protection of the First Amendment under the *Near* doctrine not only extends to the bookstore premises and to their

inventories of films and publications, but also forbids the confiscation or forfeiture of the neutral instrumentalities used for communicative purposes as well. Personal property such as printing presses, projectors, video equipment, and bookshelves obviously may be used for future dissemination of protected materials as well as of unprotected obscenity. Seizure and forfeiture of such property, as the state seeks in the present case, operates to inhibit free expression and thus constitutes an unwarranted prior restraint. As the court concluded in *State v. A Motion Picture Entitled "The Bet"*, 547 P.2d at 771,

> The Kansas nuisance abatement statute as applied to promoting obscenity is overbroad in authorizing . . . the destruction of equipment, seats or other neutral property designed for use in showing films. Such provisions of the statute are unconstitutional as a prior restraint of freedom of expression. . . . Items of neutral equipment which may be used in the future for legitimate forms of expression, such as movie projectors and theatre seats, may not be destroyed because of past transgressions of obscenity laws.

See also *Maguin v. Miller* (D.Kan. 1977), 433 F.Supp. 223; *United States v. Polak* (E.D.Pa. 1970), 312 F.Supp. 112; *Bongiovanni v. Hogan* (S.D.N.Y. 1970), 309 F.Supp. 1364.

Contrary to this extensive body of authority, a very few courts have upheld blanket injunctions and padlock orders aimed at obscenity.[8] Among the decisions squarely

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8. In addition to *Kidwell, infra*, the Ohio Supreme Court in *State ex rel. Ewing v. "Without a Stitch"* (1974), 37 Ohio St.2d 95, 307 N.E.2d 911, appeal dismissed *sub nom. Art Theater Guild, Inc. v. Ewing*, 421 U.S. 923 (1975), sustained a provision

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addressing padlock orders in the obscenity context, only one has adopted the position advanced by the state in this case. In *State ex rel. Kidwell v. U.S. Marketing, Inc.* (1981), 102 Idaho 451, 631 P.2d 622, appeal dismissed, 455 U.S. 1009 (1982), the Idaho Supreme Court upheld that state's nuisance statute authorizing closure of the offending establishment for one year. The court construed the padlock sanction as an *in rem* penalty against property involved in the commission of obscenity violations, rather than as a prior restraint, and distinguished *Near* on grounds that the Idaho padlock provision did not restrict future speech on the basis of content.

Appellees do not rely on *Kidwell*, as they deny the relevance of authority arising under nuisance and ob-

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for closure of a theater for one year upon a showing of a single obscene film exhibition. The Ohio Court emphasized, however, that the property owner could gain release from the padlock order by filing a bond and demonstrating that the specific nuisance would not recur, and narrowly construed the statute by holding that the nuisance to be prevented by the order was limited to the showing of the particular film adjudged to be obscene. The court thus suggested that the state could not require the theater owner to demonstrate that no obscene films would be exhibited, implying that such a blanket injunction would create an impermissible prior restraint. 37 Ohio St.2d at 105, 307 N.E.2d at 918. In *Fehlhaber v. North Carolina* (4th Cir. 1982), 675 F.2d 1365, however, the court upheld such a blanket injunction prohibiting future distribution of unspecified *obscene* materials.

The Indiana RICO/CRRA statutes impose much more severe sanctions than the courts considered in either of these cases, permitting seizure orders of indefinite duration and creating a remedy of permanent forfeiture which would extend to protected materials and neutral instrumentalities. These decisions are therefore readily distinguishable from the case before us, as well as contradictory to the weight of constitutional authority. See, e.g., *Spokane Arcades, supra; Vance, supra.*

scenity statutes to these RICO/CRRA proceedings. Instead, the state relies exclusively upon *Western Business Systems, Inc. v. Slaton* (N.D. Ga. 1980), 492 F.Supp. 513, in which the court employs similar reasoning to uphold the Georgia RICO statute's forfeiture provisions as applied to the predicate offense of obscenity.

In *Western Business Systems,* the district court denied a preliminary injunction by which plaintiffs sought to restrain future application of the state's RICO act. Because the plaintiffs, sellers of sexually-oriented materials, had not yet suffered prosecution under the statute, the court held that they lacked standing, but gratuitously went on to pronounce the statute constitutional as applied to obscenity. In so holding, the court dismissed plaintiffs' First Amendment overbreadth claim on grounds similar to those adduced in *Kidwell:*

> . . . all property, of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds, is subject to forfeiture to the state. . . . Thus, if the items seized are books or movie films, the seizure is totally unrelated to their contents.

492 F.Supp. at 514.

Along with other courts and commentators, we find the logic of these two cases strained and artificial,[9] and

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9. The only two other courts to embrace the *Kidwell* reasoning have been reversed by reviewing courts. See *Spokane Arcades, Inc. v. Eikenberry* (E.D.Wash. 1982), 544 F.Supp. 1034, *rev'd.,* 725 F.2d 482 (9th Cir. 1984); *State ex rel. Cahalan v. Diversified Theatrical Corp.* (1975), 59 Mich.App. 223, 229 N.W.2d 389, *rev'd.,* 396 Mich. 244, 240 N.W.2d 460 (1976). The Idaho decision has also been critically analyzed in Note, *State ex rel. Kidwell v. U.S. Marketing, Inc.: Prior Restraint and Obscenity Under the Idaho Moral Nuisance Abatement Act,* 19 Idaho L. Rev. 135 (1983), and in Trachtman, *supra* note 6, at 1502-6.

agree with appellants that *Western Business Systems* is wrongly decided, as it contravenes the higher authority of *Vance.* The reasoning evinced in these cases is, moreover, inimical to the principles of *Near v. Minnesota* and of other leading Supreme Court decisions in this area.

The courts in *Kidwell* and *Western Business Systems* dismiss prior restraint claims by characterizing the challenged regulations as content neutral, *in rem* penalties for past illegal conduct. We first address the contention that these padlock and forfeiture orders do not constitute prior restraints but merely represent punishment for criminal offenses. Although the state here proffers this rationale, the constitutional standards embodied in *Near* do not permit us to accept such a justification uncritically: "in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and . . . the statute must be tested by its operation and effect." 283 U.S. at 708.

The prospective effect of these sanctions upon protected expression is undeniable and stems directly from the nature of the statutory scheme as an "anti-racketeering" measure. As applied to obscenity, the direct effect of these RICO/CRRA remedies is the closure of bookstores and theaters. "Since it is clear that purveyors of obscenity are also in part distributors of protected speech, seeking to eliminate obscenity entrepreneurs includes the goal of restricting protected speech in the future, beyond the desire to punish the distribution of unprotected speech in the past."[10] To construe these padlock and forfeiture

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10. Trachtman, *supra* note 6, at 1503.

penalties simply as punishment for past misdeeds would be to ignore their actual operation and effect as prior restraints.

In addition, the *Kidwell* and *Western Business Systems* courts' reliance upon the alleged content neutrality of seizure and forfeiture sanctions is misplaced. We find highly dubious the proposition that these measures, applied in the obscenity context to close adult bookstores, are content neutral in any meaningful sense. More fundamentally, content neutrality regarding the suppressed speech or publication in no way inures a regulatory scheme from a challenge to its constitutionality on prior restraint grounds. The Court in its insightful *Near* opinion does not suggest that content neutrality removes a regulation from the definition of prior restraint; rather, Chief Justice Hughes quotes Blackstone in broadly defining the unconstitutional regulation to include *any* "previous restraints upon publications", 283 U.S. at 713. Fatal to the state's position is the modern authority of *Organization for a Better Austin v. Keefe*, 402 U.S. at 417, in which the Court strikes down as a prior restraint a content neutral order enjoining the distribution of " 'pamphlets, leaflets or literature of any kind.' "

Our foregoing analysis of the property seizure and forfeiture remedies under the prior restraint doctrine applies equally to other RICO/CRRA remedies. The state in *4447 Corp.*, et al., also seeks forfeiture of defendants' business licenses and revocation of their corporate charters. Because these licenses and charters are obviously prerequisites for the corporate defendants' continued operation, their denial or revocation works as effective a prior restraint as do the seizure and other forfeiture sanctions.

Such denial or forfeiture of licenses and charters based upon the past behavior of a business in distributing obscenity has been roundly condemned as a prior restraint by other courts. As the Court of Appeals has succinctly observed in *Genusa v. City of Peoria* (7th Cir. 1980), 619 F.2d 1203, 1219:

> We know of no doctrine that permits the state to deny to a person First Amendment liberties . . . solely because that person was once convicted of a crime or other offense.

As in *Genusa*, the district court in *Cornflower Entertainment, Inc. v. Salt Lake City Corporation* (D.Utah 1980), 485 F.Supp. 777, also strikes down city ordinances authorizing revocation of theater and bookstore licenses based on past obscenity violations. Citing *Vance*, the court expressly rejects the state's argument, central to appellees' position in this case, that this civil closure remedy serves as a penalty for past abuses and therefore does not constitute a prior restraint. On the contrary, the court responds, 485 F.Supp. at 786:

> To reason that an involuntary closure of a motion picture theatre for past obscenity violations does not constitute a prior restraint is clearly contrary to the Supreme Court's definition of prior restraint.

In the recent case of *Gayety Theatres, Inc. v. City of Miami* (11th Cir. 1983), 719 F.2d 1550, the Court of Appeals similarly held that the city ordinance providing for revocation of a theater's or bookstore's license for one year, based solely upon one obscenity conviction, imposed an unconstitutional prior restraint on presumptively protected expression. Relying on the *Near* doctrine and upon

Vance and its numerous progeny, the court observed emphatically that

> the City can no more impose such a prior restraint on the plaintiff than it could by ordinance restrain a citizen from speaking in public for one year because the citizen once uttered an obscenity in a public place.

719 F.2d at 1552.

Other state and federal courts presented with the issue of license revocation in response to obscenity violations have unanimously adopted the same view: *Entertainment Concepts, Inc. III v. Maciejewski* (7th Cir. 1980), 631 F.2d 497; *Yuclan Enterprises, Inc. v. Arre* (D.Hawaii 1980), 488 F.Supp. 820; *Evansville Book Mart, Inc. v. City of Indianapolis* (S.D.Ind. 1979), 477 F.Supp. 128; *Bayside Enterprises, Inc. v. Carson* (M.D. Fla. 1979), 470 F.Supp. 1140; *Natco Theatres, Inc. v. Ratner* (S.D.N.Y. 1979), 463 F.Supp. 1124; *Oregon Bookmark Corp. v. Schrunk* (D.Or. 1970), 321 F.Supp. 639; *Perrine v. Municipal Court* (1971), 5 C.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648, *cert. denied*, 404 U.S. 1038 (1972); *City of Delevan v. Thomas* (1975), 31 Ill.App.3d 630, 334 N.E.2d 190; *Alexander v. City of St. Paul* (1975), 303 Minn. 201, 227 N.W.2d 370; *Hamar Theatres, Inc. v. City of Newark* (1977), 150 N.J.Super. 14, 374 A.2d 502; *City of Seattle v. Bittner* (1973), 81 Wash.2d 747, 505 P.2d 126.

These decisions are informed by the central teaching of *Near* that even the most flagrant abuses of the freedoms of speech and press do not justify the imposition of sanctions which prospectively curtail communicative activity. The corporate defendants' right to continue operation of these bookstores may not be abridged on the basis of past

obscenity convictions, whether by padlock order, property forfeiture, or license revocation. The same principle further precludes the state from obtaining an order pursuant to IC 34-4-30.5-2(1)-(3), requiring that defendants divest themselves of any interest in these enterprises, restricting their investment in similar businesses, or dissolving or reorganizing these enterprises. See *Gayety Theatres, supra.*

The present case vividly illustrates the rationale for longstanding hostility to any system of prior restraints under our Constitution. The injunctive and forfeiture remedies to which the state has resorted here threaten to impact dramatically upon public access to controversial materials and divergent opinions. Such provisions allowing the state to close bookstores and theaters are incomparably more repressive than subsequent penalties for distribution of particular obscene materials. Not only are the RICO/CRRA statutes draconian in their effect, but they are also prone to abuse given the relative ease with which the state may invoke their sanctions. Devoid of procedural strictures including the standard of proof of a criminal prosecution, these civil remedies invite indiscriminate prosecution. The operation of these statutes, which is both swift and severe, may indeed curb the availability of obscenity but cuts a broad swath into the realm of protected expression as well. The consequent overbreadth of these measures with their attendant chilling effect on the exercise of First Amendment rights renders the entire statutory scheme constitutionally invalid. We therefore hold that the injunctive remedies of IC 34-4-30.5-2, and the seizure and forfeiture sanctions of IC 34-4-30.5-3, -4, con-

stitute facially unconstitutional prior restraints in their application to the predicate offense of obscenity.

III.

We have thus initially determined that the RICO/CRRA statutes impose unconstitutional restraints upon protected expression. Because the plaintiffs in this case do not even allege that the entire inventories of these padlocked bookstores are obscene, the seizure orders necessarily restrict some protected materials and must fall under the near-absolute constitutional ban on prior restraints of protected speech.

Additionally, these measures entail procedural defects which would render the proceedings thereunder invalid even as applied to suppress actual obscenity. The mere allegation by local officials that speech or publication is obscene does not end our prior restraint inquiry. As the protected or unprotected nature of the speech remains to be determined, the state must adhere to constitutionally required procedures for its suppression. Otherwise, the resulting seizure or forfeiture order poses an unconstitutional prior restraint notwithstanding the fact the state could legitimately suppress the seized materials as obscenity.

Given the paramount importance of First Amendment guarantees and the threat to those rights posed by overzealous prosecution of unprotected expression, the Supreme Court has outlined exacting procedural safeguards which must attend state efforts to suppress alleged obscenity. To ensure "the necessary sensitivity to freedom of expression", *Freedman v. Maryland* (1965), 380 U.S.

51, 58, the Court has effected a hybridization of First Amendment concerns and traditional due process standards.[11]

At the same time it declared obscenity to be unprotected speech in *Roth*, the Supreme Court began to define the constitutional limits which must condition injunctive measures to control obscenity. In *Kingsley Books, Inc. v. Brown* (1957), 354 U.S. 436, the Court upheld a narrow and precise New York obscenity statute authorizing an *ex parte* injunction against a particular book alleged to be obscene, but requiring trial on the merits within one day and a final decision within two days of trial. Subsequent caselaw indicates that the procedures approved in *Kingsley Books* embody minimal standards for proceedings against obscenity, as the Court has continually refined and reaffirmed these requirements.

In *Speiser v. Randall, supra*, decided the year after *Roth* and *Kingsley Books*, the Court began in earnest the task of elaborating procedural limits to the suppression of unprotected speech. The case presented a challenge to California constitutional and statutory provisions conditioning a tax exemption upon nonadvocacy of the overthrow of government. The Court observed that when the state seeks to restrain unlawful advocacy and thus implicates the "transcendent value" of freedom of speech,

> it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society.

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11. See Monaghan, *First Amendment "Due Process"*, 83 Harv.L.Rev. 518 (1970).

> Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of the restraint on speech in each case depends on careful analysis of the particular circumstances, the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford. (Citations omitted.)

357 U.S. at 521. The Court then proceeded to invalidate the tax provisions on grounds that they impermissibly allocated to the individual the burden of persuasion as to the protected nature of expression.

Subsequent decisions have fleshed out the skeletal requirements suggested by *Kingsley Books* and *Speiser*. In *Marcus v. Search Warrants of Property* (1961), 367 U.S. 717, the court condemned as violative of the Fourteenth Amendment the mass seizure of materials alleged by police to be obscene but with no prior judicial determination of obscenity. The challenged Missouri procedure allowed for issuance of a general warrant merely on the basis of police allegations regarding the existence of obscene materials. Police were empowered under the ensuing warrant to search the premises and to seize whatever in their discretion they deemed obscene. Pursuant to the warrant issued in *Marcus* police searched the warehouse of a wholesale distributor of magazines, newspapers, and books along with five retail newstands. They seized 11,000 copies of 280 publications, most of which were previously unspecified, and most of which were later adjudged nonobscene.

Concluding that this procedure lacked the necessary safeguards to afford due process protection to nonobscene materials, the court emphasized both the *ex parte* nature of the proceeding and the absence of any independent judi-

cial determination of the obscenity issue. Justice Brennan for the Court insisted upon procedures "designed to focus searchingly upon the question of obscenity" prior to any such mass seizure, 367 U.S. at 732, complaining that under the Missouri statute,

> the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of . . . materials considered by the complainant to be obscene . . . . Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees.

Id. at 732-33.

The Court in *Marcus* distinguished *Kingsley Books* as sanctioning a limited injunctive remedy against particular named publications and under closely defined procedural safeguards, as opposed to the Missouri scheme which

> inhibited the circulation of publications indiscriminately because of the absence of any such safeguards . . . . *Kingsley Books* does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene.

Id. at 734-36.

In *Quantity of Copies of Books v. Kansas* (1964), 378 U.S. at 205, the Court underscored this prerequisite of an adversarial determination of obscenity prior to any large-scale seizure of expressive materials. In an action under the Kansas obscenity statute, the state attorney general filed an information alleging the obscenity of 59 titles in a

series of sexually-oriented paperback novels. Copies of seven of the books accompanied the information and were reviewed by the trial judge in a brief *ex parte* inquiry. Finding these books obscene, the judge issued a warrant authorizing the sheriff to seize the novels identified by title in the information. Police then impounded all copies of the titles they discovered in the bookseller's possession, some 1715 books in all.

Fatal to this prosecution, the Supreme Court concluded, was the failure to afford appellants an adversary hearing on the question of the books' obscenity. Despite the warrant's specificity as to the materials to be seized, the mass seizure of all copies of the specified titles rendered the procedure constitutionally deficient in threatening to suppress nonobscene books. The fact that a full hearing on the obscenity issue followed the seizure did not impress the Court: "For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public in a free society to unobstructed circulation of nonobscene books." 378 U.S. at 213.

The following year in *Freedman v. Maryland* (1965), 380 U.S. 51, the Court unanimously invalidated the state's motion picture censorship statute as inadequately guaranteeing against inhibition of protected expression. The statute required distributors to submit all films to a censorship board prior to exhibition, and granted the board virtually unfettered discretion to ban films on various grounds including obscenity.

In striking down the Maryland provision as a prior restraint, the Court synthesized themes developed in the earlier cases to require three basic safeguards in any

proceeding to enjoin or otherwise suppress unprotected speech: (1) the censor must bear the burden of proof that the material is unprotected under the First Amendment; (2) a prompt adversarial hearing and final adjudication on the obscenity issue must be assured by statute or by "authoritative judicial construction"; and (3) any prior restraint before judicial review must be strictly limited in duration. 380 U.S. at 58-59.

The Supreme Court has recently reaffirmed these principles in *Vance v. Universal Amusement Co.* (1980), 445 U.S. 308, *aff'g. per curiam* on other grounds, 587 F.2d 159 (5th Cir. 1978). The Court there invoked the *Freedman* guidelines to affirm the Court of Appeals, deeming the Texas nuisance statutes violative of the First and Fourteenth Amendments because they authorized injunctions of indefinite duration prior to a final judicial determination of obscenity and without any guarantees of prompt review of a preliminary finding of probable obscenity.

The Court in *Vance* rejected the state's argument that such blanket injunctions against the exhibition of named or unnamed films would constitute no more objectionable a restraint than would a criminal obscenity proceeding.

> Presumably an exhibitor would be required to obey such an order pending review of its merits and would be subject to contempt proceedings even if the film is ultimately found to be nonobscene. Such prior restraints would be more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited, since nonobscenity would be a defense to any criminal prosecution.

445 U.S. at 316. The Court agreed with the conclusion of the Court of Appeals that "the absence of any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures . . . precludes the enforcement of these nuisance statutes against motion picture exhibitors." *Id.* at 317. *Vance* thus provides the most recent indication that the Supreme Court will not tolerate injunctive remedies against obscenity in the absence of strict procedural safeguards.

Appellants correctly assert that as a vehicle for the suppression of obscenity, the RICO/CRRA statutes are procedurally deficient under these due process standards developed in the context of First Amendment concerns. Because of these procedural defects, the state may not constitutionally maintain a RICO/CRRA action on the basis of obscenity, even if the statutes' application were limited to materials alleged to be obscene.

First, we address appellant's contention that the *ex parte* nature of the seizure order renders it invalid under the line of cases encompassing *Marcus* and *Quantity of Copies of Books*. These decisions unequivocally require an adversarial determination of obscenity prior to the imposition of such restraints upon the distribution of communicative materials.

In the cases before us, the trial courts have issued orders for the seizure and padlocking of appellants' bookstores, following *ex parte* determinations of probable cause regarding two prior or contemporaneous obscenity violations. The judge in the case of *4447 Corp.*, et al. has apparently reviewed the four films submitted by the prosecution to establish such probable cause. In the Fort Wayne action, the trial court has considered in an *ex parte*

proceeding the appellants' past obscenity convictions, along with police allegations regarding the obscene nature of the bookstores' contents and their taped descriptions of seized materials.

These *ex parte* proceedings do not pass constitutional muster. Even if the entire contents of these bookstores were alleged and subsequently adjudged to be obscene, the *Marcus* and *Quantity* decisions require an adversarial determination of the obscenity of each item prior to the *en masse* seizure of such materials. In each of these cases, the trial courts have made *ex parte* determinations only as to the probability of obscenity violations, with no regard to the obscenity of all seized materials. To the extent that the courts have considered the obscenity of most of these books, films, and magazines, they have relied exclusively upon conclusory assertions and descriptions by police of alleged obscenity. Such *ex parte* proceedings, characterized by the absence of an independent judicial determination of obscenity, are precisely of the order deemed unconstitutional *ab initio* by the Supreme Court in *Marcus* and *Quantity*.

The state's reliance upon *Heller v. New York* (1973), 413 U.S. 483, in this regard is entirely misguided. The Supreme Court in *Heller* approved an *ex parte* determination of probable obscenity only in narrowly-defined circumstances involving seizure of a single copy of an allegedly obscene film for *bona fide* purposes of preserving it as evidence in a criminal proceeding. The Court explicitly disapproved any mass seizures of communicative materials on an *ex parte* basis as in the present case.

The judge issuing the warrant in *Heller* viewed the entire film at a commercial movie house before signing the

warrant for its seizure. The Court upheld this procedure on grounds that an adversary hearing was not required where the state sought merely to secure one allegedly obscene item as evidence. The Court stressed, however, that its approval was conditiond upon the availability of a prompt judicial determination of obscenity in an adversary proceeding. Further, the seizure must not operate as a prior restraint upon exhibition of the film; on a showing that other copies were not available, the court should either return the film or permit the exhibitor to copy it.

The Court in *Heller* specifically stated that it would not retreat from the principles of *Quantity of Copies of Books* and *Marcus* but rather would "scrutinize any large-scale seizures of books, films, or other materials presumptively protected under the First Amendment" to ascertain that the requirements of those decisions were fully met. 413 U.S. at 491. Contrary to appellees' interpretation, *Heller* thus provides no support for the contention that an *ex parte* probable cause determination of prior obscenity violations may constitutionally sustain the indefinite seizure of entire bookstores. Rather, the cautionary terms in which the *Heller* Court couched its holding underscore the unconstitutionality of such an injunctive regulation, the purpose or effect of which is to inhibit free expression prior to a final judicial determination of obscenity.

Heller thus implicates the broader question of the procedural validity of these statutes generally as they provide for remedies of seizures and forfeiture of communicative materials. Not only are the initial *ex parte* proceedings constitutionally deficient; the resulting seizure orders and the statutes' provisions for permanent forfeiture impose continuing restraints which inherently contravene each of

the three requirements of *Freedman v. Maryland*. We conclude that the RICO/CRRA acts as applied to obscenity are structurally incompatible with the *Freedman* guidelines, designed by the Court to mitigate the chilling effect on protected speech of laws which afford courts the discretion to draw the uncertain line between legitimate and unprotected expression.

First, the statutory scheme assigns the state no burden of proof regarding obscenity, beyond the requirement that plaintiffs adduce two predicate offenses. Far from requiring that the state affirmatively demonstrate the obscenity of all materials subject to seizure and forfeiture, the RICO/CRRA statutes do not even permit the defendants to litigate the issue and to establish the nonobscenity of most of the seized books, films, and magazines. The state's burden of showing that defendants have purveyed obscenity in the past hardly satisfies the constitutional requirement that the state prove the obscenity of all suppressed materials.

The statutes' allowance for such blanket suppression of entire bookstores and theaters necessarily violates the second and third *Freedman* standards as well. Unlike the precise measure approved in *Kingsley Books*, these statutes make no provision for prompt adversarial review and more fundamentally, bypass any comprehensive obscenity adjudication. Similarly, the final requirement of *Freedman*—that prior restraint before judicial review be strictly limited in duration—clearly prohibits the indefinite seizure and permanent forfeiture of materials never afforded judicial review at all.

We reiterate that for purposes of these *Freedman* guidelines, as distinguished from our analysis of the stat-

utes' operation as substantive prior restraints, it is irrelevant whether the suppressed materials in fact represent protected or unprotected speech. Even if every item seized from these bookstores might ultimately be adjudged obscene, the seizure orders and any subsequent forfeiture judgments would still be unconstitutional due to these procedural irregularities.

The state claims that these actions are not governed by the procedural strictures peculiar to First Amendment litigation because the RICO/CRRA statutes are not intended as a means of censorship. We have noted above our conclusion that for constitutional purposes, these proceedings must be viewed as the functional equivalent of a nuisance or obscenity action. Again, we must reject the contention that the state may so broadly inhibit the circulation of books, films, and other expressive materials on grounds that they represent incidents of "racketeering activity" and are therefore subject to forfeiture as mere contraband. The Supreme Court has summarily dismissed this proposition in *Marcus*, 367 U.S. at 730-31, noting that the analogy of obscene literature to gambling paraphernalia or other contraband for search and seizure purposes "does not . . . answer the appellants' constitutional claim, but merely restates the issue whether obscenity may be treated in the same way." Concluding that it may not, the Court emphasized that because of the sensitive nature of First Amendment determinations, "a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Id.* at 731. See also *Quantity of Copies of Books*, 378 U.S. at 211-12.

Our discussion of the procedural irregularities of these statutes and of the instant proceedings thereunder is not

meant to imply that the RICO/CRRA provisions are susceptible of a saving construction by judicial interpretation. Rather, we conclude that any such attempt to render the statutes constitutional would create a complete incongruity never intended by the legislature.

Our analysis of these statutes under the *substantive* prior restraint doctrine has revealed that the sweeping remedies they afford are for most purposes patently unconstitutional. Some courts in considering the constitutionality of nuisance abatement statutes and similar measures as applied to obscenity have avoided the constitutional problem by means of a limiting construction of the statute, simply holding the statute inapplicable to obscenity as a predicate offense. This avenue is not open here, as the statutory scheme before us explicitly creates a predicate offense of obscenity. At best, we could limit the operation of these statutes to the seizure and forfeiture of particular items alleged and subsequently adjudged to be obscene. However, consideration of the *procedural* requirements of the prior restraint doctrine indicates that grave constitutional problems would even so continue to plague this application of the statutes. The attempt to preserve the statutes' constitutionality by a narrowing construction, therefore, would be an unnecessarily tortuous exercise, creating a provision anomalous in relation to the overall operation of the RICO/CRRA statutes. Moreover, the eviscerated version of the acts as applied to obscenity would add nothing to the prosecutorial tools now afforded by our criminal obscenity statute. We will not ascribe to the legislative intent such an absurd result. Accordingly, we conclude that the seizure orders against these defendants and the statutes' application to obscenity generally

must be characterized as both substantively and procedurally unconstitutional under the prior restraint doctrine: as prior restraints of protected speech, or as impermissible procedures for restraining speech which may or may not be protected.

IV.

We note finally the constitutional infirmity of the RICO/CRRA statutes under the *O'Brien* doctrine. Even conceding to the state the validity of its central arguments regarding the nature and purpose of this regulatory scheme, we conclude that its sanctions are unconstitutional as applied to obscenity, given the availability of less restrictive means in furtherance of the state's legitimate purpose.

In *United States v. O'Brien* (1968), 391 U.S. 367, the Supreme Court confronted a First Amendment challenge to governmental regulation of an apparently content-neutral nature, the federal prohibition against destruction of selective service registration cards. The defendant, convicted under this statute for burning his draft card in symbolic protest, challenged the punitive sanctions for his politically expressive act on First Amendment grounds. The Court in upholding the statute formulated a framework for assessing the incidental impact of a general regulation upon free expression, holding that:

> . . . a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest.

391 U.S. at 377.

The Court thus refined the least restrictive means doctrine applied in earlier First Amendment cases such as *Shelton v. Tucker* (1960), 364 U.S. 479. *Shelton* involved a challenge to an Arkansas statute requiring public school teachers to file an annual affidavit disclosing all organizational affiliations and contributions. Dismissed for his refusal to file such an affidavit, petitioner Shelton contended that the statute exceeded the state's legitimate purposes. The Supreme Court agreed, observing that although the state may have had a substantial interest in investigating the competence and fitness of teachers,

> . . . that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

364 U.S. at 488.

O'Brien applies this principle to legislation which does not on its face implicate First Amendment concerns such as the associational rights asserted in *Shelton*, but which incidentally affects free speech. The *O'Brien* decision further addresses this problem in the context of symbolic expressive acts, or conduct which is "intertwined with expression," *Cox v. Louisiana* (1966), 379 U.S. 559, 563, an area in which the Court has employed a balancing approach rather than the virtual presumption of unconstitutionality applied to legislative abridgements of "pure speech."

The state relies on the *O'Brien* doctrine, asserting that the RICO/CRRA provisions advance a compelling state interest which should be balanced against the First Amendment rights claimed by appellants. The state must there-

fore characterize appellants' operation of bookstores alleged to have purveyed obscenity as a course of *conduct,* i.e., a "pattern of racketeering activity," which is entitled to a diminished level of constitutional scrutiny relative to purely expressive activity.

Under well-established First Amendment principles, we must reject this characterization. The commercial distribution of books, films and other expressive materials prior to their adjudication as obscenity must be regarded as communicative activity which the First Amendment presumptively protects. Any subsequent adjudication of obscenity removes the subject materials from the sphere of constitutional protection but does not alter the essential communicative character of appellants' activity in operating a bookstore or theater.

The state also asserts that the RICO/CRRA statutes are motivated by a compelling state interest in curbing "racketeering activity" or "organized crime." The statutes as applied here, however, define "racketeering" solely in terms of the predicate offense of obscenity. Their potential operation to close bookstores and theaters upon a showing of two such violations triggers a heightened degree of scrutiny which requires that we realistically construe the state purpose underlying the obscenity application of these statutes to be the suppression of obscenity.

The regulation of obscenity does clearly fall within the state's constitutional authority under its police powers. *Paris Adult Theatre I v. Slaton,* 413 U.S. at 68-69, and thus complies with the initial requirement of *O'Brien.* We further assume for the sake of this discussion that combatting obscenity represents a substantial governmental

interest, as the Supreme Court has implied. *Id.* Because obscenity is unprotected by the First Amendment, we also grant the state's contention that the governmental interest in eradicating obscenity is unrelated to the suppression of free speech. The challenged statutes, however, run afoul of the final prong of the *O'Brien* test—they are unduly suppressive in light of the state interest involved.

A number of courts in striking down measures similar in their operation and effect to the RICO/CRRA statutes have noted the availability of less draconian means of achieving the state's goal. See, *e.g., Sanders v. State* (1974), 231 Ga. 608, 612, 203 S.E.2d 153, 156. Emphasizing the mandate of the First Amendment that the state employ "sensitive tools" for such regulation, the courts have noted that criminal obscenity prosecutions and precise injunctive remedies are appropriate because narrowly tailored to the legitimate goal of removing from circulation particular items adjudged to be obscene. Here, in contrast, the sweeping injunctive and forfeiture remedies threaten to effect the closure of any bookstore or theater which has twice disseminated obscenity. Their impact upon protected materials is undeniably direct and severe.

In many respects, our analysis of the statutes' overbreadth under the *O'Brien* test intersects with our discussion of their overbreadth under the prior restraint doctrine. In the latter context, we have concluded that the regulatory scheme with its seizure and forfeiture provisions constitutes a prior restraint, void for overbreadth because it inhibits the distribution of protected as well as unprotected expression. The *O'Brien* approach similarly focusses on the manner in which the statute impacts upon

protected expression, but does not depend upon a determination that these statutes impose a prior restraint. Rather, *O'Brien* provides an alternative rationale for our holding that these statutes are unconstitutional as applied to obscenity: their dramatic impact upon protected expression is more severe than essential to the furtherance of the state's interest in curtailing the distribution of unprotected materials.

The recent case of *J-R Distributors, Inc. v. Eikenberry* (9th Cir. 1984), 725 F.2d 482 is illustrative of the constitutional defects of this statutory scheme from the *O'Brien* perspective. In *J-R Distributors,* the Court of Appeals invalidated the Washington anti-obscenity statute, partly on grounds that it impermissibly provided for unlimited civil fines based on the total profits of an establishment deemed a moral nuisance due to the distribution of obscenity. Such fines would therefore, the court observed, "be based on profits from the *sale of protected materials* in a place that is a moral nuisance solely because obscene materials were also sold or exhibited there." 725 F.2d at 494. Because of the regulation's consequences for constitutionally protected speech, the court held,

> . . . it is impermissible, in an anti-obscenity statute, to provide that the amount of the fine shall be based, even in part, on the proceeds from constitutionally protected material. . . .
>
> By focusing on the place where the obscene materials are sold or exhibited rather than the unprotected materials themselves, the civil fine provision endangers protected speech.

Id.

The court in *J-R Distributors* draws a telling analogy between this unlimited civil fine provision and anti-obscenity padlocking remedies. While the latter have been consistently declared unconstitutional principally on grounds of the familiar presumption against prior restraints, both remedies "have the effect of preventing the dissemination of protected speech simply because obscene speech originated from the same location." *Id.* at 495, and it is this effect which renders all such remedies constitutionally objectionable. Addressing a construction which the state attempts to bestow upon the regulatory scheme in the present case, the court observes:

> It may be argued that the protected speech is not being punished but that it only serves as a measure of the appropriate punishment. Such an argument is not persuasive. The crucial point is that free speech is far too sensitive a subject matter to serve as the measurement for civil or criminal penalties.

Id.

Although the court in *J-R Distributors* does not explicitly cite *O'Brien,* it meticulously employs the *O'Brien* framework in analyzing the First Amendment issue. The court first notes the state's constitutional power to regulate nuisances, an exercise of the police power which the courts have consistently treated as a legitimate or substantial state interest. Observing that the unlimited fine provision applies uniquely to businesses affected by the anti-obscenity statute, whereas the state's general nuisance statute sets forth minimum and maximum civil penalties, the court questions whether such differential treatment " 'suggests that the goal of the regulation is not unrelated to the suppression of expression;' " such a goal is of course

presumptively unconstitutional. *Id.* (quoting *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* (1983), 103 S.Ct. 1365, 1375). Finally, the court implicitly applies the last prong of the *O'Brien* test, concluding that the basing of fines on profits from the sale or exhibition of constitutionally protected materials is unnecessary to the achievement of the legitimate state goal of suppressing obscenity as a moral nuisance. Rather, the state "could have achieved its legislative goals by more carefully tailored means that would be less restrictive of free expression," the court concludes, citing *Shelton v. Tucker*. *Id.* at 496.

This application of the least restrictive means standard is equally apposite to the cases before us. Even if we were to accept the state's characterization of the confiscatory RICO/CRRA remedies as imposing an *in rem* penalty for past criminal conduct rather than a prior restraint, *J-R Distributors* teaches that the consequences of this regulation for protected speech are constitutionally unacceptable. Any such punishment for obscenity violations must be calibrated to the particular distribution of obscenity and must not implicate the distribution of non-obscene materials or profits from the sale thereof. The RICO/CRRA provisions for seizure and forfeiture of entire bookstores or theaters, including films, publications, and the neutral instrumentalities for their dissemination, or for the closure of such establishments by means of license revocation, etc., represent an *unduly* suppressive response to the problems occasioned by obscenity.

We therefore conclude that, however incidental such restrictive effects may be to the general regulatory scheme, the RICO/CRRA remedies as the statutes are applied to obscenity directly and necessarily inhibit the

dissemination of materials protected by the First Amendment. These broad remedies are not essential to the advancement of the state's interest in suppressing obscenity, which may be accomplished by the less restrictive means of criminal prosecutions and injunctive remedies against specified obscene materials. Under the *O'Brien* doctrine, therefore, the challenged provisions are inconsonant with the requirements of the First Amendment.

V.

In passing upon the constitutionality of these statutes, we are mindful of the current climate of opinion and of political pressures to close adult bookstores and similar establishments. It is the function of this and other courts, however, to insulate basic constitutional guarantees from the temporary vagaries of political expediency and from the vicissitudes of public opinion. Although constitutional doctrines may evolve in response to changing social conditions, we may not sacrifice principles nurtured over centuries to the fleeting passion of the hour.

Many find sexually-explicit films and publications unpalatable; to others they represent a valuable source of entertainment. Unless and until such materials are adjudged to be obscene, they are entitled to the full protection of the First Amendment and of Article I, § 9 of the Indiana Constitution. The availability of adult materials, however controversial, is an accommodation we make to the maintenance of a pluralistic, democratic society. The enduring value and ultimate test of First Amendment principles, as Justice Holmes observed, is "not free thought for those who agree with us, but freedom for the thought

that we hate." *United States v. Schwimmer* (1929), 279 U.S. 644, 654-55 (dissenting opinion).

The RICO/CRRA statutes as applied to the predicate offense of obscenity inherently lend themselves to constitutional abuses both flagrant and insidious. Although adult bookstores and theaters may be dispersed through zoning regulations, sexually-oriented entertainment may not be regulated out of existence in a particular locality. *Young v. American Mini Theaters* (1976), 427 U.S. 50; see also *Schad v. Borough of Mount Ephraim* (1981), 452 U.S. 61; *Avalon Cinema Corporation v. Thompson* (1981), 667 F.2d 659. Yet local prosecutors may employ the RICO/CRRA provisions to padlock and seize the contents of one bookstore after another until by direct application or by chilling effect, the state has entirely eradicated such establishments. Between the first such closure and the last we can draw no meaningful distinction.

Moreover, the very "neutrality" which the state claims for the impact of the injunctions and forfeitures under these statutes enhances the potential for their abuse. In the guise of a telling argument, the state concedes that the obscenity of the seized inventories of books, magazines, and films is irrelevant and need not even be alleged. This argument reflects an accurate reading of the statutes but also reveals the deeply-flawed nature of the regulatory scheme as a response to obscenity. May *avant-garde* booksellers and theaters be padlocked and forfeited to the state upon a showing that alongside literary, political, and cinematic classics, they have twice disseminated controversial works subsequently adjudged to be obscene? Our entire foregoing discussion may be distilled into the conclusion

that the guarantees of the First Amendment mean nothing if the state may arrogate such discretion over the continued existence of bookstores and theaters. The potency of the prosecutorial weapon and the threat it poses to the legitimate exercise of First Amendment freedoms obviously exceed the bounds of constitutionally permissible regulation.

In striking down the prior restraint imposed upon a newspaper in *Near v. Minnesota*, 283 U.S. at 718, the Court quoted James Madison:

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press .... [I]t is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding proper fruits.

This principle remains a vital one today; the rights of those espousing unpopular causes and controversial views must be upheld, or the rights themselves lose all security. Nor may the state override this principle in the context of obscenity prosecutions, as the Court has observed in *Bantam Books*, 372 U.S. at 66:

> ... the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards is therefore but a special instance of the larger principle that the freedoms

of expression must be ringed about with adequate bulwarks . . . . (Citations omitted.)

These considerations infom the emphatic decisions of other courts in striking down similar legislation and mandate our conclusion that the RICO/CRRA provisions as they pertain to the predicate offense of obscenity may not constitutionally stand. Accordingly, we remand these causes to the trial courts for proceedings consistent with this opinion.

Miller, P.J. concurs;
Conover, J. dissents with opinion

CONOVER, J.

DISSENTING OPINION

I dissent. The Indiana RICO/CRRA statutory scheme passes constitutional muster.

Our legislature intended the RICO/CRRA statutes should receive a broad construction, as does the federal RICO statute, *Russello v. U.S.* (1983), — U.S. —, 104 S.Ct. 300-301, so as to better curb racketeering generally in this state. Specifically as to the cases before us, it is apparent our legislature intended RICO/CRRA to be a vehicle for the suppression of obscene materials offered for sale to the public if such materials are part of the assets of a racketeering activity which the state seeks to eradicate. Thus, the central questions in these interlocutory appears are:

1. whether a state may confiscate obscene materials when they are part of the assets of a racketeering activity, and

2. if so, whether the Indiana RICO/CRRA statutory scheme passes constitutional muster in light of the First Amendment.

I. *Obscenity Subject to State Action*

Prior to 1973, no clear-cut majority spoke for the United States Supreme Court in obscenity cases. In that year, however, a five to four majority spoke in three cases. They are *Miller v. California* (1973), 413 U.S. 15; *Paris Adult Theatre I v. Slaton* (1973), 413 U.S. 49, both decided the same day, and *Heller v. New York* (1973), 413 U.S. 483, decided the following day. Thus, these cases are the only reliable precedent for our purposes.

In *Miller*, the Supreme Court said

> This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment (citing cases). 'The First and Fourteenth Amendments have never been treated as absolutes [footnotes omitted].'

Miller, 413 U.S. at 23. The majority here, in essence, adopts the "absolutist" approach long advocated by Mr. Justice Douglas. This school argues because the term "obscenity" cannot be precisely defined, First Amendment protection is absolute as to all printed or photographic materials, they are not subject to state action under any circumstances. This approach was discussed and rejected by the *Miller* Court, *cf.* 413 U.S. at 27-28.

Obscene material is subject to state actions because

> . . . . there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights

and interests "other than those of the advocates are involved." citing case) Those include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime. Quite apart from sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickel:

> "It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there . . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, *then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies.* (Emphasis in original). Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not." . . . (Emphasis added.) As Mr. Chief Justice Warren stated, there is a "right of the Nation and of the States to maintain a decent society . . .," (citing case) (dissenting opinion).

. . .

The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the

> development of human personality, can be debased and distorted by crass commercial exploitation of sex. *Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively* simply because there is no conclusive evidence or empirical data. (Emphasis supplied).

Miller, 413 U.S. at 57-60, 63. The states have a legitimate interest in suppressing salacious matter. RICO/CRRA as enacted and here applied, is Indiana's legislative response to obscenity offered for sale to the public when it constitutes part of the assets of a racketeering activity.

II. *The RICO/CRRA Statutory Scheme Constitutional*

The majority holds the RICO/CRRA statutes unconstitutional under the facts of these cases "on three distinct yet interrelated grounds", namely,

1. they operate as a prior restraint upon First Amendment-protected materials,
2. they fail to comply with procedural safeguards required even for suppression of obscene materials, and
3. they fail the less restrictive means test announced in *U.S. v. O'Brien* (1968), 391 U.S. 367, for evaluation of allegedly content-neutral state regulation having an incidental impact upon free expression.

I believe the majority is simply wrong on each count.

The encapsulated facts before us are:

1. the complaints allege the appellants have engaged in a pattern of racketeering activity as that term is defined in the RICO statute, and the state seeks o impose the remedies available to it under CRRA upon the appellants so as to terminate their racketeering activities;

2. additionally, the State has moved for immediate seizure of the defendants' assets, as authorized by I.C. 34-4-30.5-3(b);

3. importantly, a *judge* of a court of general jurisdiction *has heard evidence* and *determined* there was *probable cause for seizure* in each case as required by CRRA before the seizure of assets took place; and

4. the assets seized consisted of furniture, fixtures, bank accounts, display cases, file cabinets, office machinery, and similar items, and books, magazines motion picture films, and video tapes offered for sale to the public.

The majority concludes because books, magazines, motion picture films, and video tapes offered for sale to the public at large were part of the assets seized, the RICO/CRRA statutes are unconstitutional as to those materials. While I agree with the majority we must never permit the slightest abridgement of free speech as guaranteed by the First Amendment in any form including statutory prior restraint, it is readily apparent the materials here involved do not enjoy First Amendment protection. They are nothing more than pure, undiluted obscenity.

As the majority notes, the test for obscenity is succinctly stated in *Miller*. There the Supreme Court said

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the purient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value.

Miller, 413 U.S. at 24. With this test in mind, I state the facts presented to the trial judges in each of these cases in some detail.

In *4447 Corp.*, the probable cause affidavit of an Indianapolis Police detective sergeant assigned to its Vice branch was introduced as evidence. It recites he visited one of the appellants' establishments, the Adult Toy and Gift Shop in Indianapolis. While there, he viewed sexually explicit materials offered for sale, including magazines, video tapes, sexual aid devices, and eight millimeter motion picture films. He purchased two such films entitled "Anal Madness" and "Spin the Bottle". Each had sexually explicit cover displays. Review of these films revealed men and women engaged in deviate sexual conduct and sexual intercourse. He then went to the "Live Peep" section of the store and entered a "conversation booth" where he talked by telephone to a female. After putting money in a coin operated device as she directed, lights came on on her side of the booth. After tipping the female at her suggestion, she removed her clothing, laid on the floor, and performed erotic gyrations calculated to titillate the viewer sexually.

The detective then went to World Video in Indianapolis, another of defendants' establishments. There he saw X-rated video tapes and eight millimeter films displayed for sale. After negotiations, he purchased two films entitled "Sexual Negotiations" and "Afternoon Delight". He asked the store manager to discount the video tape "Hot Summer Night", but she warned "it was pretty rough." He then left without the video tape, but called another police officer to enter the establishment and identify the two persons with whom he had dealt. One of them

told the identifying officer she was opening a new store at 38th Street and Lafayette Road in Indianapolis. The affiant's review of the additional films he purchased at World Video revealed men and women engaged in sexual intercourse and deviate sexual conduct.

The next day affiant returned to the Adult Toy and Gift Shop and purchased the films "Big Load" and "Gyro Sex". These two films also depicted men and women engaged in sexual intercourse and deviate sexual conduct. The same day another detective went to World Video and purchased the video tape titled "Hot Summer Night". It portrayed four men forcing a young female to perform oral sex, sexual intercourse, and their beating of her with a belt.

Three days later, another detective went to the Plaza Entertainment Center near 38th Street and Lafayette Road in Indianapolis. Although the business appeared to be open, the detective discovered upon entering there were several construction workers present. However, sexually explicit magazines, films and other materials were displayed for sale. Upon inquiry, one worker told the detective the store would not be open until Monday. He then showed the detective the "live peep" and mini theater sections, indicating the theater portion would not be completed until December.

Based upon those facts, his examination of other documents, and his numerous investigations into businesses of this nature, the detective sergeant stated he reasonably believed all three locations were under common ownership and control, part of the same enterprise, and being operated by the various corporations and individuals named as de-

fendants in the case in a manner violative of the Indiana RICO statute.

In *Ft. Wayne Books*, the prosecutor sought seizure of assets under facts paralleling those in *4447 Corp.* However, probable cause in *Ft. Wayne Books* additionally was based upon nineteen convictions of these corporations for distributing obscene matter for consideration and nineteen convictions of individuals who acted as agents of those corporations for the same offenses. Such evidence clearly demonstrates two or more incidents of racketeering activity, and the obscene nature of the materials at issue in each case.

Although the First Amendment does not protect obscene materials as a limitation on the police power of the states under the Fourteenth Amendment, *Paris Adult Theater I*, 413 U.S. at 54; *Miller*, 413 U.S. at 23-25; *Kois v. Wisconsin* (1972), 408 U.S. 229, 230, they are entitled presumptively to First Amendment protection initially, simply because they consist of books, magazines, movies, and video tapes. The constitutional rub comes at this point. To pass constitutional muster, a statutory scheme seeking to suppress obscene matter must also leave undisturbed those materials which qualify for First Amendment protection. It is on this point many prior statutory strategies have been impaled upon the First Amendment.

Only a few of the scores of cases cited by the majority bear directly upon the question of whether Indiana's RICO/CRRA statutory scheme falls within current constitutional parameters.

In *Freedman v. Maryland* (1965), 380 U.S. 51, the United States Supreme Court struck down a state scheme

for the licensing of motion pictures because it did not require resolution of the obscenity question with reasonable promptness by a judicial determination in an adversary proceeding prior to imposition of a valid *final* restraint. *Id.*, 380 U.S. at 58. The Supreme Court later explained its holding in *Freedman* in these words

> The settled rule is that a system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." . . .
>
> We held in *Freedman*, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

Southeastern Promotions, Ltd. v. Conrad (1975), 420 U.S. 546, 560, 95 S.Ct. 1239, 1247.[1] It further stated in that decision the *Freedman* rule applied not only to motion pictures and live plays, it also applied to materials, *cf. United States v. Thirty-Seven Photographs* (1971), 402 U.S. 363, (customs agents seized imported materials) and *Blount*

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[1] In this case a municipal board denied the promoters of the musical "Hair" use of a municipal theatre. The board made that determination because of outside reports it had received "the production would not be in the best interest of the community." In a district court action after the promoter's application for preliminary injunction had been denied, the district court sitting with an advisory jury determined "Hair" was obscene and denied a permanent injunction.

v. Rizzi (1971), 400 U.S. 410, (postal laws authorized postal officials to restrict use of the mails).

In *Southeastern Promotions* the Supreme Court said

> Procedural safeguards were lacking in several respects. The board's system did *not* provide a procedure for *prompt judicial* review. (Emphasis supplied.)

Southeastern Promotions, 420 U.S. at 561.

Does the Indiana statute CRRA provide procedural safeguards "designed to obviate the dangers of a censorship system" by providing "a procedure for prompt judicial review" in cases where materials presumptively entitled to First Amendment protection are involved? Clearly it does. I.C. 34-4-30.5-3(b) provides

. . .

> (b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order *upon a showing of probable cause* to believe that a violation of IC 35-45-6-2 *involving the property in question* has occurred. (Emphasis supplied.)

Not only are presumptive First Amendment materials so protected, *all* property subject to immediate seizure receives like treatment under CRRA's provisions. Judicial review is required prior to seizure of any property.

Does the fact this judicial review is *ex parte* render this procedure objectional under the *Freedman* rule? Again, the answer is no.

Chief Justice Burger, speaking for the majority, cogently answered this question in *Heller*.[2] He said

> This Court has never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. (Citations omitted.) In particular, there is no such absolute right where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution. In *Lee Art Theater v. Virgina, supra,* the Court went so far as to suggest that it was an open question whether a judge need "have viewed the motion picture before issuing the warrant." Here the judge viewed the entire film and, indeed, witnessed the alleged criminal act. It is not contested that the judge was a "neutral, detached magistrate," that he had a full opportunity for independent judicial determination of probable cause prior to issuing the warrant, and that he was able to "focus searchingly on the question of obscenity." (Citations omitted.)
>
> In *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971), and *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), we held that "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid *final restraint.*" 402 U.S., at 367, 91 S.Ct., at 1403, quoting 380 U.S., at 58, 85 S.Ct., at 738 (emphasis added).
>
> . . . Even in those cases, we did not require that the adversary proceeding must take place prior to

---

[2] In *Heller,* a New York Criminal Court judge watched an entire allegedly obscene film at a theatre at the request of an assistant district attorney. Upon its conclusion, the judge issued warrants, the film was seized, then used as evidence in a later criminal action.

> *initial* seizure. Rather, it was held that a judicial determination must occur "promptly so that administrative delay does not in itself become a form of censorship." (Citations omitted.) . . . If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. . . .
>
> With such safeguards, we do not perceive that an adversary hearing *prior* to a seizure by lawful warrant would materially increase First Amendment protection. (Citations omitted.) The necessity for a prior judicial determination of probable cause will protect against gross abuses, while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guarantees, with only a minimal intereference with public circulation pending litigation.

Heller, 413 U.S. at 489, 492-493, 93 S.Ct. at 2793, 2795.

From my review of these cases, I perceive the rule to be when a non-judicial determination of obscenity is made in First Amendment cases, the statutory scheme involved must place the onus on the determining authority to carry the proceedings promptly forward to a *final* judicial determination of the obscenity question after an adversarial hearing. The defendant is not required to take the initiative in such cases. The rule is otherwise, however, when the proceedings at issue are initially begun, as here, in a judicial setting. In such cases the procedural scheme must provide for

> (a) an *initial* determination the materials to be seized are, in fact, obscene, and

(b) assurance a prompt *final* judicial determination as to obscenity is readily available to any interested party.

However, there is no onus on the plaintiff, after the initial *ex parte* determination, to push the matter to a final hearing on the obscenity issue.

As to the availability of a prompt final hearing under RICO/CRRA, the seizure provisions are but another form of civil attachment. On that subject, Ind. Rules of Civil Procedure, Trial Rule 64 reads, in part

> (A) *Ancillary remedies to assist in enforcement of judgment.* At the commencement of and during the course of an action, all remedies providing for seizure of . . . property are available under the circumstances and in the manner provided by law and existing at the time the remedy is sought.
>
> The remedies thus available include, without limitation, . . . attachment . . . or equivalent legal or equitable remedies, however designated . . .

CRRA provides a civil remedy to the state for the pursuit of racketeering assets. Thus, the provisions of Indiana's civil attachment statute, I.C. 34-1-11-1, et seq., were and are available to the appellants at anytime.[3] I.C. 34-1-11-33 reads in part

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[3] We note parenthetically the trial court in *4447 Corp.* sua sponte set that case for final hearing on August 4, three days after the initial ex parte hearing on August 1. Appellants appeared that day and filed dilatory motions. Although no date for a final obscenity hearing was set by the trial court in *Ft. Wayne Books*, the initial hearing was held, the appellants appeared three days later, but also filed dilatory motions instead of promptly seeking the *final* adversarial hearing on the obscenity question to which they were, and are, entitled, as noted in the main text.

> Any defendant against whom an order of attachment has been issued may, after appearing to the action, move to have the attachment discharged and restitution awarded of any property taken under it;
>
> . . . .

Under this statutory scheme, a prompt final adversarial hearing on the obscenity question was available to appellants. In both *4447 Corp.* and *Ft. Wayne Books* the appellants have filed dilatory motions rather than seek the final adversarial hearing to which they are entitled. Similar facts were present in *Heller*. The Court there said

> A judicial determination of obscenity, following a fully adversary trial, occurred within 48 days of the temporary seizure. Petitioner made no pretrial motions seeking return of the film or challenging its seizure, nor did he request expedited judicial consideration of the obscenity issue, so it is entirely possible that a prompt judicial determination of the obscenity issue in an adversary proceeding could have been obtained if petitioner had desired. Although we have refrained from establishing rigid, specific time deadlines in proceedings involving seizure of allegedly obscene material, we have definitely excluded from any consideration of "promptness" *those delays caused by the choice of the defendant.* (Citations omitted.) In this case, the barrier to a prompt judicial determination of the obscenity issue in an adversary proceeding was not the State, but petitioner's decision to waive pretrial motions and reserve the obscenity issue for trial. Cf. *Kingsley Books, Inc. v. Brown*, 354 U.S., at 439, 77 S.Ct., at 1326. (Emphasis supplied and footnote omitted.)

Heller, 413 U.S. at 490-491. Thus, delay in a prompt final adversary hearing on the obscenity question in both the

cases before us is chargeable to the appellants not the appellees.

The majority ignores the facts before us when it says in section III of its opinion "the protected or unprotected nature of the speech remains to be determined. . . ." The character of these materials initially has been determined by a disinterested magistrate in each case. They are obscene. Because the RICO/CRRA statutory system mandates an initial judicial hearing prior to seizure, and any interested party is assured of a prompt final hearing on the obscenity question, it is constitutional.

The majority eschews *Heller* calling it inapplicable here because it involved only one film which was held by the state as evidence to be used in a later prosecution. Rejection of *Heller* is unwarranted because it was intended to be precedential authority for cases involving larger quantities of obscene materials, per note 7 of that opinion.

Referring to *Marcus* and *Quantity of Books*, this note 7 reads

> In particular, *Marcus* involved seizure by police officers acting pursuant to a general warrant of 11,000 copies of 280 publications. 367 U.S., at 723. *Unlike this case*, there was *no independent judicial determination of obscenity* by a *neutral, detached magistrate*, nor were the seizures made to preserve evidence for a criminal prosecution. *Id.*, at 732. The sole purpose was to seize the articles as contraband and to cause them "to be publicly destroyed, by burning or otherwise." *Id.*, at 721 n. 6. In *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), 1,715 copies of 31 publications were seized by a county sheriff, *also without any prior judicial determination of obscenity* and, again, for the sole purpose of destroying the publications as contraband. *Id.*, at 206-209. (Emphasis supplied.)

Heller, 413 U.S. at 491. As things now stand in these cases, the materials in question have been stripped of their presumptive First Amendment protection. By judicial decree, they constitute obscene matter no more entitled to First Amendment protection than a sack of doorknobs.

A. *RICO/CRRA Has No "Chilling Effect" on First Amendment Rights*

The majority asserts RICO/CRRA has a "chilling effect"[4] upon First Amendment rights. Again, I disagree. Such contention is inapplicable here because Indiana's statutory scheme provides for judicial review before seizure. In *Freedman* the Court said the "chilling effect" of a censorship order administratively imposed is dispelled by a statutory procedure requiring prompt judicial action for its enforcement, as does RICO/CRRA as applied to these cases, *cf.* 380 U.S. at 60.

B. *RICO/CRRA Is Not "Overbroad"*

A statute is "overbroad" when it burdens or punishes activities protected by the First Amendment in a substantial degre as well as those materials not entitled to First Amendment protection. *Broadrick v. Oklahoma*

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[4] Any law or practice which has the effect of seriously discouraging the exercise of a constitutional right, including the right to free speech, is said to have a "chilling effect." *North Carolina v. Peace* (1969), 395 U.S. 711, 89 S.Ct. 2027; *United States v. Jackson* (1968), 390 U.S. 584, 88 S.Ct. 1209; Black's Law Dictionary, Fifth Edition (1979), at 217.

(1973), 413 U.S. 601, 617, 93 S.Ct. 2908, 2918; *NAACP v. Button* (1963), 371 U.S. 415, 433, 83 S.Ct. 328, 338; *Kunz v. New York* (1951), 340 U.S. 290, 304, 71 S.Ct. 312, 320; *Thornhill v. Alabama* (1940), 310 U.S. 88, 97, 60 S.Ct. 736, 742.

Patently, RICO/CRRA operates with surgical precision on obscenity. Materials entitled to First Amendment protection never can be put in jeopardy under those provisions because *no* presumptively-protected First Amendment matter may be seized by the State prior to a judicial determination of obscenity. The main target here is obscene materials, not presumptively-protected First Amendment materials. Thus, this statutory scheme is not "overbroad." *See, Broadrick,* 413 U.S. at 615-17; 93 S.Ct. at 2917-18.

C. *RICO/CRRA Does Not Violate the "Less Restrictive Means" Test*

The majority claims RICO/CRRA fails the "less restrictive means test" of *U.S. v. O'Brien* (1968), 391 U.S. 367. I demur to that statement.

Under *O'Brien,* state regulation is sufficiently justified if

(a) it is within the constitutional power of government,

(b) it furthers an important or substantial governmental interest,

(c) the governmental interest is unrelated to the suppression of free expression, and

(d) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The majority concedes the first three requirements, but claims the incidental restriction on protected material is greater than necessary or essential to the furtherance of Indiana's governmental interest. Again, I disagree.

The majority reaches the wrong conclusion when it asserts there must be some First Amendment-protected materials suppressed because no allegations in the complaints deny their presence. The character of the material at issue has been judicially determined for our purposes. A disinterested magistrate has determined all are obscene. Further, a prompt final adversarial hearing is available to appellants at any time. If any First Amendment-protected material is present that fact will be determined at the final obscenity hearing. Any such prior restraint is merely incidental and transitory. If any is present, it will be returned to the stream of commerce after the final hearing. Thus, the *O'Brien* test is in all respects fulfilled. Until the final hearing, the evidence preponderates all materials seized are obscene.

Although the above discussion fully states my position, I must address the majority's repetitive characterization of the State's actions in these cases as "padlocking bookstores," and the ominous, if unintended, innuendos that phrase invokes as to our legislature and the public officials here involved.

Under the evidence, neither the trial judge who issued the seizure orders nor the law enforcement officials who carried out those orders should be accused of "padlocking

bookstores." Such a characterization is uncalled for. They have lawfully confiscated the assets of persons and corporations allegedly engaged in patterns of racketeering activity, a part of which is the selling of the illicit contraband discussed above. It is their right and *duty* to do so under RICO/CRRA. They have padlocked "porno shops" in the public interest not "bookstores."

I would affirm the trial court in each case, and remand both for further proceedings.

APPENDIX D

STATE OF INDIANA)) SS: COUNTY OF ALLEN)		IN THE ALLEN
STATE OF INDIANA AND STEPHEN M. SIMS, PROSECUTING ATTORNEY FOR THIRTY-EIGHTH JUDICIAL CIRCUIT, Plaintiff,	))))))))	CIRCUIT COURT
vs.	)	CAUSE NO.
FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., EROTICA HOUSE BOOKSTORE, INC., MR. DONALD KRONTZ; MR. DONALD KRONTZ IN HIS CAPACITY AS MANAGER OF FORT WAYNE BOOKS, INC., MANAGER OF CINEMA BLUE OF FORT WAYNE, INC., MANAGER OF EROTICA HOUSE BOOKSTORE, INC.; MR. DONALD KRONTZ IN HIS CAPACITY AS A MEMBER OF THE BOARD OF DIRECTORS OF FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., EROTICA HOUSE BOOKSTORE, INC.; MARK A. BROOKS,	))	84-446 ORDER

THE GROUP d/b/a EUROPEAN)
INVESTMENTS N V,)
THE GROUP d|b|a THEATRE A)
CORPORATION,)
NANCY S. JOHNSON,)
CYRUS B. COOPER,)
)
Defendants.)

Comes now the Prosecuting Attorney of the 38th Judicial Circuit, Stephen M. Sims, and files his Complaint For Injunctive Relief From Corrupt Business Influence and Action For Forfeiture of Property Incident to Corrupt Business Influence pursuant to Indiana Code 34-4-30.5-2 and Indiana Code 34-4-30.5-3 (a) and comes now the Prosecuting Attorney and files his Petition for Seizure of Property Incident to Corrupt Business Influence pursuant to Indiana Code 34-4-30.5-3 and submits therewith a "Probable Cause Affidavit" as part thereof, which are in the following words and figures:

(H. I.)

And the Court having examined said petitions and probable cause affidavit and having heard evidence on same NOW FINDS THAT:

1. That said petitions and probable cause affidavit comply with requirements of Indiana Code 34-4-30.5-2 and Indiana Code 34-4-30.5-3;

2. That the Court having reviewed said petitions and probable cause affidavit and having heard evidence on same finds pursuant to Indiana Code 34-4-30.5-3 and Indiana Code 34-4-30.5-2;

a) That the Prosecuting Attorney for the 38th Judicial Circuit has filed an action for forfeiture of any property used in the course of, intended for the use in the course of, derived from or realized through conduct in violation of Indiana Code 35-45-6-2;

b) That said action was brought in the Allen Circuit Court, which has proper jurisdiction of same;

c) That the Prosecutor has properly filed a petition for property "subject to forfeiture" to be seized by a law enforcement agency, and has simultaneously filed a proper probable cause affidavit;

d) That the probable cause affidavit submitted with said petition for seizure of "property subject to forfeiture" does in and of itself establish probable cause and the Court now finds that there is probable cause that Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., Erotica House Bookstore, Inc., and the other defendants, have formed an enterprise that is and has violated Indiana Code 35-45-6-2 and that said defendants have used the following specific real property, the buildings thereon and all of the contents of said buildings for actual use in the course of, or intended use in the course of, or that same have been derived from, or realized through, conduct in violation of Indiana Code 35-45-6-2:

i) Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, together with the building and all of the contents of said building;

ii) Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana,

together with the building and all of the contents of said building;

iii) Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, together with the building and all of the contents of said building.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The Sheriff of Allen County is ordered to seize that property "subject to forfeiture" which is commonly known as:

a) Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, together with the building thereon and all of the contents of said building, real or personal;

b) Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, together with the building thereon and all of the contents of said building, real or personal;

c) Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, together with the building thereon and all of the contents of said building, real or personal;

2. That pursuant to Indiana Code 34-4-30.5-4 (b), the Sheriff of Allen County is directed to make such seizure immediately upon receipt of this Order and may make such seizure in one or more of the following manners:

a) Place the property under seal;

b) Remove the property or any part thereof to a place designated by the Court; or

c) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

3. The Sheriff of Allen County is specifically authorized to use officers under his command to effectuate this Order as well as any Fort Wayne police officers allowed to him by the Fort Wayne Police Department;

4. The defendants, Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc., are ordered by this Court to avoid removing any liquid assets now in the State of Indiana from the State of Indiana, or from dissipating any bank accounts or secreting same until further order of this Court.

ALL OF WHICH IS ORDERED THIS 19TH DAY OF MARCH, 1984.

/s/ Thomas L. Ryan
Judge, Allen Circuit Court

APPENDIX E

STATE of INDIANA
CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

Cause Number
29S04-8703-CV-00270
LOWER CAUSE
C83-346

4447 CORP., ET AL VS STEPHEN GOLDSMITH, STEPHEN SIMS ET AL

You are hereby notified that the SUPREME COURT has on this day 6/18/87 "APPELLANTS' PETITION FOR REHEARING" IS HEREBY DENIED THIS 18TH DAY OF JUNE, 1987. SHEPARD, C.J., CONCURS IN THE DENIAL OF REHEARING IN 4447 CORPORATION V GOLDSMITH BUT WOULD GRANT REHEARING IN FORT WAYNE BOOKS, INC. V STATE IN A SEPARATE OPINION. DE BRULER, J., WOULD GRANT REHEARING. GIVAN, PIVARNIK AND DICKSON, JJ., WOULD DENY REHEARING, WITHOUT OPINION

WITNESS my name and the seal of said Court, this 18th day of June, 1987

/s/ Dan Heisen
Clerk Supreme Court,
Court of Appeals and Tax Court

IN THE
SUPREME COURT OF INDIANA

4447 CORPORATION, et al., Appellants, v. STEPHEN GOLDSMITH, Appellee,	)	No. 4-1293 A 415 in the Court of Appeals
FORT WAYNE BOOKS, INC., et al., Appellants, v. STATE OF INDIANA AND STEPHEN M. SIMS, Appellee.	)	No. 29S04-8703-CV-270 in the Supreme Court

ON PETITION FOR REHEARING

Shepard, C.J., concurring in part and dissenting in part.

I join in the Court's denial of rehearing in *4447 Corporation v. Goldsmith*, though I take a somewhat different view of the case. However, I would grant rehearing in *Fort Wayne Books v. State* and vacate the trial court's seizure order.

The two cases which have been consolidated for consideration of their common legal issues differ substantially in the degree to which the State has afforded the defendants opportunity for a hearing on the merits underlying the seizure of their property. The importance of such an opportunity has long been recognized by the Court as a part of due process:

> It is fundamental that no person can be deprived of any article which is recognizable by the law as property, without a judicial hearing, after due notice. No degree of misconduct, or wrong, can justify the forfeiture of the property of a citizen, except in pursuance of some judicial procedure, of which the owner shall have notice, and in which he shall have the opportunity to contest the ground upon which the forfeiture is claimed.

State v. Robbins (1890), 124 Ind., 308, 312, 24 N.E.2d 978, 979.

The properties in question in this case are bookstores which have not been subject to final forfeiture but have been ordered seized as property subject to possible forfeiture. Because the owners have been deprived of their "continued possession and use of the goods," such deprivation can only be imposed in a manner consistent with due process. *Fuentes v. Shevin*, 407 U.S. 67, 86, 92 S.Ct. 1983, 1997, 32 L.Ed.2d 556, 573 (1972).

Both seizure orders in these cases were issued after *ex parte* hearings without notice to appellants. In both cases, there was a judicial determination of probable cause that the defendants had violated the Racketeer Influences and Corrupt Organizations Act (RICO), Ind. Code § 35-4-6-1, and that the property was subject to forfeiture under the Civil Remedies for Racketeering Activity Act, Ind. Code § 34-4-30.5-1. The Marion County order set a trial on the merits just four days after the seizure. The two operating bookstores in Marion county were allowed to continue operating, but they were required to preserve certain business equipment and list other property. A third bookstore, as yet unopened, was sealed.

The Allen County order did not set a trial date and the parties appeared before the court only after appellant Fort

Wayne Books filed a motion to vacate or modify the order. Three operating Allen County bookstores were sealed and their contents hauled away. Those stores remain closed for more than a year until the Court of Appeals granted a stay.

Issuance of a seizure order *ex parte* does not of itself violate due process. Extraordinary circumstances may justify seizure without notice or hearing. Such seizure is permissible if: 1) the seizure serves significant governmental purposes, 2) notice and hearing might frustrate the purpose of the government purpose, for example, by allowing destruction or removal of the property to be seized, and 3) seizure is not initiated by self-interested third parties. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed. 2d 452 (1974).

The court may issue an *ex parte* order initially, but the order cannot be continued indefinitely. Some federal courts facing similar situations have required the government to establish by a preponderance of the evidence, at an adversarial hearing, that is is likely to prove at trial that the defendant is guilty of a violation of the statute and that the property is subject to forfeiture. *United States v. Spilotro*, 680 F.2d 612 (9th Cir. 1982); *United States v. Long*, 654 F.2d 911 (3d Cir. 1981); *United States v. Rogers*, 602 F.Supp. 1332 (D. Colo. 1985); *United States v. Veon*, 538 F.Supp. 237 (E.D.Cal. 1982).

A somewhat different test was used by the district court in *United States v. Beckman*, 562 F.Supp. 488 (E.D. Mich. 1983). That court required the government to prove by clear and convincing evidence that the property sought to be restrained was involved in a RICO violation, that the property was subject to forfeiture, and that the govern-

ment had reasonable grounds to believe that the defendant was likely to make the property inaccessible.

Both of these tests are consistent with standard due process analysis, balancing the individual's interest in avoiding limitations on liberty and the governmental interest in preserving assets which may be subject to forfeiture.

The fact that the property seized here is material that may be protected by the First Amendment should play an important part in determining what due process requires. Though this Court determined that seizure was not an unconstitutional prior restraint, the nature of the material seized is still important in a determination of due process. "[D]ue process calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L.Ed.2d 484, 494, 92 S.Ct. 2593 (1972).

Even an *ex parte* order seizing expressive materials may not violate the First Amendment. "This Court has never held, nor even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized." *Heller v. New York*, 413 U.S. 483, 448, 93 S.Ct. 2789, 2792, 37 L.Ed.2d 745, 751 (1973).

Stricter standards, however, have been applied to the seizure of communicative materials. "It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband." *A Quantity of Books v. Kansas*, 378 U.S. 205, 211-212, 84 S.Ct. 1723, 1726, 12 L.Ed.2d 808, 813 (1964). "An order issued in the area of First Amendment rights

must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. Princess Ann*, 393 U.S. 175, 183, 89 S.Ct. 347, 353, 21 L.Ed. 2d 325, 332-333 (1968).

The United States Supreme Court has enunciated procedural safeguards designed to obviate the dangers of seizing constitutionally protected matters. The burden in these procedures is on the government to show that the communication is unprotected. There must be a judicial determination in an adversary proceeding within a brief period following the seizure to assure the proper sensitivity to freedom of expression. The restraint in advance of the final determination on the merits must be limited to the preservation of the *status quo*, and there must be a prompt final judicial decision. *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

While these procedures were designed in cases which required a judicial determination of obscenity not required here, they are instructive as to the kinds of procedures necessary to safeguard both individual rights to property and society's interest in preserving free expression. Reading these requirements and those standards governing seizure of non-expressive material, I am led to the following standards for seizure of expressive material where the government claims the right of seizure on grounds other than the content of the material.

A court may issue an *ex parte* seizure order initially following a judicial determination of probable cause. I would require that the seizure be followed shortly thereafter by an adversarial hearing at which the State bears the burden of proving that the property was used to commit or derived

from a RICO violation. The court must then balance the interests of the individual property owner with the State's interest in preserving the property subject to forfeiture to determine if pre-forfeiture seizure is warranted. If such restraint is required, the court must also consider society's interest in protecting freedom of expression and limit the restraint to the protection of the *status quo*. In short, the order must be fashioned to use the least restrictive means, a traditional requirement for State action which indirectly affect expressive activity. *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Finally, the court must provide for a prompt final determination on the merits.

The statutes authorizing the seizure of property subject to forfeiture through a RICO violation do not provide procedures which comply with these due process requirements. Ind. Code § 34-4-30.5-3(b) allows for seizure upon a judicial determination that there is probable cause to believe that a RICO violation involving the property has occurred. Ind. Code § 34-4-30.5-4 requires the prosecuting attorney to bring an action for forfeiture "promptly" and provides that property be returned if an action is not instituted within 180 days of the seizure.

The Supreme Court, when faced with a federal statute that authorized seizure of obscene materials by customs officials but failed to prescribe time limits for institution and completion of forfeiture proceedings, chose to construe the statute to bring it within constitutional bounds. Relying on the legislative history of the statute, which reflected a clear intent that forfeiture actions be timely, the Court required that an action be brought within fourteen days of seizure and that a final determination be made within sixty days.

United States v. Thirty-seven Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971).

Clearly, Indiana's provision for release of property when an action is not brought within one hundred eighty days lies well outside these parameters. However, that general provision applies to seizures of both expressive and non-expressive materials. Delay in bringing forfeiture proceedings may not rise to the level of due process violation when the material seized is non-expressive. Whether delay in bringing a forfeiture action against non-expressive material is unreasonable should be determined by weighing the length of the delay, the reason for the delay, the defendant's assertion of his rights and any prejudice which he suffers thereby. *United States v. $8,850*, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed2d 143 (1983).

Thus, the one hundred eighty day time limit could satisfy the due process requirements for seizure of non-expressive property but be insufficient to provide due process for the seizure of expressive property. Even though we do not have available the extensive legislative history of the Indiana forfeiture statute[1], it could be construed to apply more stringent time limitations on the seizure of expressive materials, thus giving it a saving construction and allowing the application of that construction in this case. Without such

---

[1]The Uni 1 States Supreme Court, in imposing a constitutionally valid time limit for bringing a forfeiture action against allegedly obscene materials seized by customs officials, relied on the record of debates in the Senate, early drafts of amendments to the statute, and changed circumstances since the statute was enacted in 1930, to determine that the legislature intended that the statute require a prompt determination following the seizure of expressive materials. *United States v. Thirty-seven Photographs*, 402 U.S. 363, at 370-372.

a construction, it is unconstitutional as applied to the seizure of expressive materials.

If the statute is given a saving construction, the Marion County order satisfies the requirements of due process. Upon issuing the order, the court set a trial date for a prompt adversarial hearing. The restraint was limited to maintaining the *status quo*, while preserving the property for possible forfeiture.

The Allen County order, however, does not comply with due process. The order was not limited to preserving the *status quo;* indeed, the entire contents of three bookstores were hauled away and kept under lock an key for an entire year. The court did not set an adversarial hearing. The fact that the court heard appellant's motion to vacate the order four days after the seizure is unavailing. A hearing had at the instigation of the defendant on his own motion necessarily places the burden of proof on the defendant. Due process requires a prompt adversarial hearing at which the State bears the burden. *See Carroll*, 393 U.S. 175.

Indiana's forfeiture statute should be construed to place stringent time limits on forfeiture of seizure of expressive materials, to require a prompt adversarial hearing and to limit restraint to maintaining the *status quo*. Because the Marion County proceedings complied with these requirements, its order should be affirmed. Because the Allen County proceedings did not provide for a prompt adversarial hearing and because the restraint went beyond that needed to preserve the *status quo*, that seizure order should be vacated.

APPENDIX F

CHAPTER 30.5

CIVIL REMEDIES FOR RACKETEERING ACTIVITY

34-4-30.5-1. *Definitions.*—As used in this chapter:

"Aggrieved person" means a person who has an interest in real property or in an enterprise that:

(1) Is the object of corrupt business influence (IC 35-45-6-2); or

(2) Has suffered damages or harm as a result of corrupt business influence (IC 35-45-6-2).

"Enterprise" means the same as the definition of that term found in IC 35-45-6-1. [IC 34-4-30.5-1, as added by Acts 1980, P.L. 199, § 1; P.L.308-1985, § 1.]

34-4-30.5-2. *Action by prosecuting attorney to enjoin violation of IC* 35-45-6-2*—Orders.*—The prosecuting attorney in a county in which the violation occurs, may bring an action to enjoin a violation of IC 35-45-6-2. An action under this section may be brought in any circuit or superior court in a county in which the violation occurs. If the court finds by a preponderance of the evidence that a violation of IC 35-45-6-2 has occurred, it may:

(1) Order a defendant to divest himself of any interest in any enterprise or real property;

(2) Impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) Order the dissolution or reorganization of any enterprise;

(4) Order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(5) Order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) Make any other order or judgment that the court considers appropriate.

In any order or judgment made by the court under this section, the judge shall make due provision for the rights of innocent persons. [IC 34-4-30.5-2, as added by Acts 1980, P.L. 199, § 1.]

34-4-30.5-3. *Action by prosecuting attorney for forfeiture of property—Orders.*—(a) The prosecuting attorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any

circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2, the court shal. order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred. [IC 34-4-30.5-3, as added by Acts 1980, P.L. 199, § 1.]

34-4-30.5-4. *Seizure of property by law enforcement officer—Seizure without court order—Disposition pending forfeiture and final disposition—Return to owner.*—(a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. Seizure may be made without court order only if:

(1) The seizure is incident to a lawful arrest or search, or to an inspection under an administrative inspection warrant; or

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter.

(b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:

(1) Place the property under seal;

(2) Remove the property to a place designated by the court; or

(3) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(c) Property seized under subsection (a) is not subject to [replevin], but is considered to be in the custody of the law enforcement officer making the se e, subject only to order of the court. However, if a seizure of property is made in accordance with subsection (a), the prosecuting attorney shall promptly bring an action for forfeiture under section 3 [34-4-30.5-3] of this chapter. If an action is not filed within one hundred eighty [180] days after the date of the seizure, the law enforcement agency whose officer made the seizure shall return the property to its owner. [IC 34-4-30.5-4, as added by Acts 1980, P.L. 199, § 1.]

34-4-30.5-5. *Actions by aggrieved person.*—(a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive

relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable damage to the aggrieved person is not required. The court may order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

(b) An aggrieved person may bring an action against a person who has violated IC 35-45-6-2 in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located, for damages suffered as a result of corrupt business influence. Upon a showing by a preponderance of the evidence that the aggrieved person has been damaged by corrupt business influence, the court shall order the person causing the damage through a violation of IC 35-45-6-2 to pay to the aggrieved person:

(1) An amount equal to three (3) times his actual damages;

(2) The costs of the action;

(3) A reasonable attorney's fee; and

(4) Any punitive damages awarded by the court and allowable under law.

(c) The defendant and the aggrieved person are entitled to a trial by jury in an action brought under this section.

(d) An aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state has in the same property or proceeds.

(e) If the state is an aggrieved person, the attorney general has concurrent jurisdiction with the prosecuting attorney to bring an action under this section. [IC 34-4-30.5-5, as added by Acts 1980, P.L. 199, § 1; P.L. 308-1985, § 2.]

34-4-30.5-6. *Collateral estoppel.*—In any action brought under this chapter, the principle of collateral estoppel operates to bar relitigation of the issues previously determined in a criminal proceeding under IC 35-45-6-2. [IC 34-4-30.5-6, as added by Acts 1980, P.L. 199, § 1.]

CHAPTER 6

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

35-45-6-1. *Definitions.*—As used in this chapter:

"Documentary material" means any document, drawing, photograph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) Sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) Union, association, or group, whether a legal entity or merely associated in fact.

"Pattern of racketeering activity" means engaging in at least two [2] incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five [5] years after a prior incident of racketeering activity.

"Racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation, of a provision of IC 23-2-1, or of a rule or order issued under IC 23-2-1; a violation of IC 35-47; a violation of IC 35-49-3; murder (IC 35-42-1-1); battery as a class C felony (IC 35-42-2-1); kidnapping (IC 35-42-3-2); child exploitation (IC 35-42-4-4); robbery (IC 35-42-5-1); arson (IC 35-43-1-1); burglary (IC 35-43-2-1); theft (IC 35-43-4-2); receiving stolen property (IC 35-43-4-2); forgery (IC 35-43-5-2); fraud (IC 35-43-5-4); bribery (IC 35-44-1-1); official misconduct (IC 35-44-1-2); conflict of interest (IC 35-44-1-3); perjury (IC 35-44-2-1); tampering (IC 35-44-3-4); intimidation (IC 35-45-2-1); promoting prostitution (IC 35-45-4-4); promoting professional gambling (IC 35-45-5-4); dealing in cocaine or a narcotic drug (IC 35-48-4-1); dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2); dealing in a schedule IV controlled substance (IC 35-48-4-3); dealing in a schedule V controlled substance (IC 35-48-4-4); or dealing in marijuana, hash oil, or hashish (IC 35-48-4-10). [IC 35-45-6-1, as added by Acts 1980, P.L. 199, § 2; P.L.190-1984, § 1.]

35-45-6-2. *Corrupt business influence—Penalty.*—(a) A person:

(1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C felony. [IC 35-45-6-2, as added by Acts 1980, P.L. 199, § 2.]

ARTICLE 49
OBSCENITY AND PORNOGRAPHY

35-49-1-1. *Applicability of definitions.*—The definitions in this chapter apply throughout this article. [IC 35-49-1-1, as added by P.L.311-1983, § 33.]

35-49-1-2. *Distribute.*—"Distribute" means to transfer possession for a consideration. [IC 35-49-1-2, as added by P.L.311-1983, § 33.]

35-49-1-3. *Matter.*—"Matter" means:

(1) Any book, magazine, newspaper, or other printed or writter. material;

(2) Any picture, drawing, photograph, motion picture, or other pictorial representation;

(3) Any statue or other figure;

(4) Any recording, transcription, or mechanical, chemical, or electrical reproduction; or

(5) Any other articles, equipment, machines, or materials. [IC 35-49-1-3, as added by P.L.311-1983, § 33.]

35-49-1-4. *Minor.*—"Minor" means any individual under the age of eighteen [18] years. [IC 35-49-1-4, as added by P.L.311-1983, § 33.]

35-49-1-5. *Nudity.*—"Nudity" means:

(1) The showing of the human male or female genitals, pubic area, or buttocks with less than a full opaque covering;

(2) The showing of the female breast with less than a fully opaque covering of any part of the nipple; or

(3) The depiction of covered male genitals in a discernibly turgid state. [IC 35-49-1-5, as added by P.L.311-1983, § 33.]

35-49-1-6. *Owner.*—"Owner" means any person who owns or has legal right to possession of any matter. [IC 35-49-1-6, as added by P.L.311-1983, § 33.]

35-49-1-7. *Performance.*—"Performance" means any play, motion picture, dance or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one (1) or more persons. [IC 35-49-1-7, as added by P.L.311-1983, § 33.]

35-49-1-8. *Sado-masochistic abuse.*—"Sado-masochistic abuse" means flagellation or torture by or upon a per-

son as an act of sexual stimulation or gratification. [IC 35-49-1-8, as added by P.L.311-1983, § 33.]

35-49-1-9. *Sexual conduct.*—"Sexual conduct" means:

(1) Sexual intercourse or deviate sexual conduct;

(2) Exhibition of the uncovered genitals in the context of masturbation or other sexual activity;

(3) Exhibition of the uncovered genitals of a person under sixteen [16] years of age;

(4) Sado-masochistic abuse; or

(5) Sexual intercourse or deviate sexual conduct with an animal. [IC 35-49-1-9, as added by P.L.311-1983, § 33.]

35-49-1-10. *Sexual excitement.*—"Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal. [IC 35-49-1-10, as added by P.L.311-1983, § 33.]

35-49-2-1. *Obscene matter or performance.*—A matter or performance is obscene for purposes of this article if:

(1) The average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;

(2) The matter or performance depicts or describes, in a patently offensive way, sexual conduct; and

(3) The matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value. [IC 35-49-2-1, as added by P.L.311-1983, § 33.]

35-49-3-1. *Importation or distribution of obscene matter.*—A person who knowingly or intentionally:

(1) Sends or brings into Indiana obscene matter for sale or distribution; or

(2) Offers to distribute, distributes, or exhibits to another person obscene matter;

commits a class A misdemeanor. However, the offense is a class D felony if the obscene matter depicts or describes sexual conduct involving any person who is or appears to be under sixteen [16] years of age. [IC 35-49-3-1, as added by P.L.311-1983, § 33.]

35-49-3-2. *Activities related to obscene performance.*—A person who knowingly or intentionally engages in, participates in, manages, produces, sponsors, presents, exhibits, photographs, films, or videotapes any obscene performance commits a class A misdemeanor. However, the offense is a class D felony if the obscene performance depicts or describes sexual conduct involving any person who is or appears to be under sixteen [16] years of age. [IC 35-49-3-2, as added by P.L.311-1983, § 33.]

35-49-3-3. *Providing obscene matter and performances before minors.*—A person who knowingly or intentionally:

(1) Disseminates matter to minors that is harmful to minors;

(2) Displays matter that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

(3) Sells or displays for sale to any person matter that is harmful to minors within five hundred feet [500'] of the nearest property line of a school or church;

(4) Engages in or conducts a performance before minors that is harmful to minors;

(5) Engages in or conducts a performance that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

(6) Misrepresents his age for the purpose of obtaining admission to an area from which minors are restricted because of the display of matter or a performance that is harmful to minors; or

(7) Misrepresents that he is a parent or guardian of a minor for the purpose of obtaining admission of the minor to an area where minors are being restricted because of display of matter or performance that is harmful to minors;

commits a class A misdemeanor. [IC 35-49-3-3, as added by P.L.311-1983, § 33.]

35-49-3-4. *Defenses.*—It is a defense to a prosecution under section 3 [35-49-3-3] of this chapter for the defendant to show:

(1) That the matter was disseminated or that the performance was performed for legitimate scientific or educational purposes;

(2) That the matter was disseminated or displayed to or that the performance was performed before the recipient by a bona fide school, museum, or public library

that qualifies for certain property tax exemptions under IC 6-1.1-10, or by an employee of such a school, museum, or public library acting within the scope of his employment;

(3) That he had reasonable cause to believe that the minor involved was eighteen [18] years old or older and that the minor exhibited to the defendant a draft card, driver's license, birth certificate, or other official or apparently official document purporting to establish that the minor was eighteen [18] years old or older; or

(4) That he was a salesclerk, motion picture projectionist, usher, or ticket taker, acting within the scope of his employment and that he had no financial interest in the place where he was so employed. [IC 35-49-3-4, as added by P.L.311-1983, § 33.]

APPENDIX G

IN THE
COURT OF APPEALS
State Of Arizona
Division One

STATE OF ARIZONA,	)	I CA-CR 9471
	)	
Appellant,	)	
	)	Department C
v.	)	
	)	
STEVEN FELD, LARRY CHABLER,	)	OPINION
	)	
	)	
Appellees.	)	
	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause CR-148389

The Honorable Alan S. Kamin, Judge

REVERSED AND REMANDED

CORCORAN, Judge

Defendants Steven Feld and Larry Chabler were charged by Count I of the criminal indictment with conducting an illegal enterprise through racketeering. The other three counts of the indictment alleged the exhibition of obscene films by various combinations of the individual defendants and a corporate defendant, C.A.T., Inc., dba Erotica Motel. Defendants Feld and Chabler moved to dismiss Count I and the trial court granted the motion and the state appealed. *See* A.R.S. § 13-4032(1); *Litak v. Scott*, 138 Ariz. 599, 676 P.2d 631 (1984). C.A.T., Inc. is

not a party to this appeal. Defendants moved to delay trial of the other counts pending resolution of this appeal. The motion was granted. We vacate the order of dismissal and reinstate Count I.

The trial court explained its reasoning for granting the motion to dismiss, which we summarize as follows:

> 1. The pre-conviction remedies of A.R.S. § 13-2314(C) constitute impermissible prior restraints on protected expression when employed in RICO/obscenity prosecutions.
>
> 2. Similarly, the post-conviction remedies of § 13-2314(D) are generally inappropriate for application in obscenity cases.
>
> 3. To try to interpret § 13-2314(B), (C) and (D) in such a way as to render them constitutional would require a tortuous interpretation which would not reflect the legislature's intent.
>
> 4. The civil burden of proof made applicable by § 13-2314(F) further complicates the constitutional problems of the remedies.
>
> 5. Once the civil remedies of § 13-2314 have been made inapplicable to obscenity prosecutions, to allow the use of obscenity as a predicate offense for racketeering makes no sense, because the only remaining effect is to convert conduct that is a class 6 felony under A.R.S. § 13-3502 into a class 3 felony under § 13-2312, which cannot be the legislative intent in making obscenity a predicate offense under the RICO statutes.

The issue presented is whether the trial court erred by finding that the Arizona organized crime and fraud statutes (RICO), A.R.S. §§ 13-2301, *et seq.*, are unconstitutional as applied to obscenity proceedings, and by granting defendants' motion to dismiss Count I. RICO is an

acronym for the federal Racketeer Influenced and Corrupt Practices statutes, 18 U.S.C. §§ 1961, *et seq.*, upon which the Arizona racketeering statutes are based. *See* A.R.S. §§ 13-2312 to -2315, Historical Notes; *Baines v. Superior Court*, 142 Ariz. 145, 148, 688 P.2d 1037, 1040 (App. 1984).

Under RICO,

> ["r]acketeering" means any act, including any preparatory or completed offense, committed for financial gain, which is chargeable or indictable under the laws of the state in which the act occurred . . . and punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted, involving: . . . [o]bscenity.

A.R.S. § 13-2301(D)(4). A.R.S. § 13-3501(2) defines an item as obscene when: (a) the "average person, applying contemporary state standards, would find that the item, taken as a whole, appeals to the prurient interest; . . . (b) [such person] would find that the item depicts or describes, in a patently offensive way, sexual activity; . . . [and] (c) [t]he item, taken as a whole, lacks serious literary, artistic, political or scientific value."[1]

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[1]The United States Supreme Court's opinion in *Pope v. Illinois*, — U.S. —, 107 S. Ct. 1918, — L. Ed. 2d — (1987), does not affect our statute. In *Pope*, the court reaffirmed the tripartite test for judging whether material is obscene, as articulated in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). The court noted that *Smith v. United States*, 431 US. 291, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977), held that

> [T]he first and second prongs of the *Miller* test—appeal to prurient interest and patent offensiveness—are issues of fact for the jury to determine applying contemporary community standards.

. . . .

(Continued on next page)

The state argues that the remedies set forth in A.R.S. § 13-2314 are constitutional on their face, and if not, must be interpreted in such a way as to be constitutional, if possible. The state also urges that even if some remedies are unconstitutional, the trial court was not justified in finding that obscenity could not be used as a predicate offense under the RICO statutes. Defendants urge that the majority of the prejudgment and post-judgment RICO remedies are unconstitutional as applied to obscenity, and that it makes little sense for the court to try to save any of the provisions once the unconstitutional portions thereof are excised. Defendants also argue that the crime of illegally conducting an enterprise through obscenity is unconstitutionally vague.

We need not here recount the long history of the law dealing with obscenity. *See State ex rel. Collins v. Superior Court* [*Scott*], No. 17962-SA (Ariz. Sup. Ct. July 2, 1986). In general, publications are presumed to be protected from governmental interference pursuant to the first amendment of the United States Constitution. *Roaden v. Kentucky*, 413 U.S. 496, 93 S. Ct. 2796, 37 L.Ed. 2d 757 (1973). Obscenity is not within the area of consti-

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(Continued from previous page)

> [As to *Miller's* third prong], [t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

— U.S. at —, 107 S. Ct. at 1920-21, — L. Ed. 2d at —. Thus, the third prong of A.R.S. § 13,3501(2) must be analyzed according to this reasonable person standard, which is entirely consistent with the language in our statute.

tutionally protected speech or press and may therefore be regulated by the State. *Roth v. United States,* 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957); *State v. Book-Cellar, Inc.,* 139 Ariz. 525, 679 P.2d 548 (App. 1984). However, "[w]hile obscenity is not constitutionally protected, the procedure by which we determine what is obscene, unprotected speech directly implicates the first amendment because the threat of criminal prosecution chills freedom of expression." *State ex rel. Collins v. Superior Court* [*Scott*], slip op. at 18 (dissent). The line between protected and unprotected speech is finely drawn and requires the use of sensitive tools to discern and enforce the boundary. *E.g., Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975). The legislature, by making obscenity a predicate offense under the racketeering statute, has called into question the constitutionality of some portions of RICO when applied to obscenity because the remedies which are appropriate to other RICO criminal offenses are unconstitutionally overbroad in the obscenity area when applied to protected speech as opposed to unprotected obscenity.

Nevertheless, courts strive to save statutes which may be interpreted to be constitutional. *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 105 S. Ct. 2794, 86 L.Ed.2d 394 (1985); *State ex rel. Kidwell v. U.S. Mktg., Inc.,* 102 Idaho 451, 631 P.2d 622 (1981), *appeal dismissed,* 455 U.S. 1009, 102 S. Ct. 1649, 71 L.Ed.2d 878 (1982). Thus, in interpreting Arizona statutes dealing with obscenity this court has, when possible, given the questioned statute a constitutional construction. *Book-Cellar,* 139 Ariz. at 528, 679 P.2d at 551. Our duty is to uphold statutes, even if they are not artfully drawn. *Id.* By adding obscenity as a

predicate offense in § 13-2301, the legislature manifested an intent that where obscenity is connected to racketeering, it needs to be dealt with in the racketeering statutes, rather than solely through the obscenity statutes, A.R.S. §§ 13-3501, *et seq.,* or nuisance statutes, A.R.S. §§ 12-811, *et seq.* We therefore strive to interpret the questioned statutes to effect that intent, to the extent that is constitutionally permissible.

1. *Standing*

Initially, we must determine whether defendants have standing to challenge the constitutionality of RICO as applied to obscenity charges.

The state asserts that it will not attempt to seize items or close businesses before trial, but will only request orders necessary to maintain the status quo. Thus, it might be argued that defendants have no standing to contest what the state *might* do. Although the state in its original brief "submits it would be a waste of judicial economy to decide this case on the basis that the trial court's ruling was premature," and that "the state agrees that the trial court's ruling should be considered on appeal in its entirety," in its supplemental brief, the state argues that defendants cannot challenge the facial validity of the statute because defendants' activities are clearly obscene. We disagree.

First, even if the items for which defendants are prosecuted are clearly obscene, we must presume that the other activities of defendants are protected activity. The possible chilling effect of the RICO remedies on presumptively protected activities and the fact that defendants are being prosecuted and could be subject to any of the remedies set forth in § 13-2314 entitles them to contest the constitution-

ality of § 13-2314 and requires the court to do a facial analysis of the statute before prosecution proceeds. *Polykoff v. Collins,* 816 F.2d 1326 (9th Cir. 1987); *J-R Dist., Inc. v. Eikenberry,* 725 F.2d 482 (9th Cir. 1984), *rev'd on other grounds sub nom. Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985). *See also State v. Tocco,* 1 CA-CR 7480, slip op. at 4 (Ariz. App. Dec. 2, 1986), review pending in CR-87-0032-PR (April 7, 1987); *Western Business Sys., Inc. v. Slaton,* 492 F. Supp. 513 (N.D. Ga. 1980). As stated in the dissent in *State v. Superior Court,* slip op. at 21: "The threat of unbridled and unhindered criminal prosecution is bound to have a chilling effect upon publishers, libraries, motion picture exhibitors and the like." Moreover, our consideration of § 13-2314 indicates grave constitutional problems which would plague RICO obscenity prosecutions and affect protected activities without judicial guidance as to what constitutional limits must be placed on such prosecutions.

2. *Vagueness*

Section 13-2312(B), under which defendants were charged, provides:

> A person commits illegally conducting an enterprise if such person is employed or associated with any enterprise and conducts or participates in the conduct of such enterprise's affairs through racketeering [i.e., obscenity].

Section 13-2312(C) makes that act a class 3 felony. We reject defendants' argument that illegally conducting an enterprise through obscenity is an unconstitutionally vague offense. The basic test for determining whether a statute is unconstitutionally vague is whether the offense is defined in terms that people of average intelligence can understand, since no one may be required, at the risk of his liberty, to speculate as to the meaning of a penal statute. *State v. Serrano,* 145 Ariz. 498, 702 P.2d 1343 (App. 1985).

In *Tocco,* the defendant argued that the crime of leading organized crime, as set forth in A.R.S. § 13-2308, was unconstitutionally vague. This court held that

> A commonsense reading of the statute demonstrates a legislative intent to punish only those individuals who cooperate with a combination of individuals or businesses with the intent to assist them in violating Arizona's felony statutes on a continuing basis. The statute does not reach any constitutionally protected conduct and its proscriptions are easily understood by persons of ordinary intelligence.

Slip op. at 9. The court concluded that the crime of leading organized crime was not unconstitutionally vague. Slip op. at 13.

In *Baines v. Superior Court,* 142 Ariz. 145, 688 P.2d 1037 (App. 1984), Division Two of this court stated that the essential elements of illegally conducting an enterprise are:

> (1) defendant was employed by or associated with the enterprise;
>
> (2) that he conducted or participated in the conduct of the affairs of the enterprise;
>
> (3) that he conducted or participated in the conduct of the affairs of the enterprise through racketeering (i.e., through the commission of at least one predicate offense).

142 Ariz. at 149, 688 P.2d at 1041. Here the predicate offense of obscenity is referable to the Arizona obscenity statutes, A.R.S. §§ 13-3501, *et seq.* The definition of racke-

teering requires that the crime be for financial gain and punishable by imprisonment for more than one year. A.R.S. § 13-2301(D)(4). Further, § 13-2312(C) requires a knowing violation. The scienter requirement increases the notice to defendant that his conduct is prohibited and prevents arbitrary and discriminatory enforcement. *Tocco,* slip op. at 13. Thus, we find that § 13-2312(B) is not void for vagueness.

In *Tocco,* this court distinguished Ohio's organized crime statute which was struck down in *State v. Young,* 62 Ohio St. 2d 370, 406 N.E.2d 499, *cert. denied,* 499 U.S. 905, 101 S. Ct. 281, 66 L. Ed. 2d 137 (1980). Defendants have extensively cited *Young* in support of their vagueness argument. The Arizona statutes do not suffer from the deficiency of the Ohio statute because they do not punish a person who pursues legal activities. *Tocco,* slip op. at 8. Section 13-2312(B) makes conduct through an enterprise illegal only if it is "through racketeering." Thus, a defendant is criminally liable in a RICO obscenity prosecution only if he has committed an underlying felony obscenity crime.

3. *RICO Applied in Obscenity Cases*

A more difficult question is presented by the application of the RICO remedies in criminal obscenity prosecutions. The only opinion directly considering the constitutionality of applying RICO remedies in obscenity

prosecutions is *4447 Corp. v. Goldsmith,* 479 N.E.2d 578 (Ind. App. 1985), *vacated,* 504 N.E.2d 559 (Ind. 1987).[2] While the Indiana Supreme Court vacated the intermediate appellate court's opinion in *4447 Corp.,* we discuss the court of appeals' decision because we find it more comprehensive and persuasive than the Indiana Supreme Court's reversal of that decision.

Indiana Code Ann. § 34-4-30.5-2 & -3 provides that after the trial court finds by a preponderance of the evidence that a RICO violation has occurred, it may: (1) order divestiture of a defendant's interest in the business; (2) prohibit defendant from future activities or investments; (3) order dissolution or reorganization of the enterprise; (4) suspend or revoke licenses, permits, or corporate charters; (5) order forfeiture of property; or (6) make any other order deemed appropriate. The trial court in *4447 Corp.* ordered the padlocking of a bookstore which had not yet opened, and later ordered that the prosecution could padlock three operating bookstores and seize their contents. The police proceeded to seize and cart away the entire contents of the three bookstores.

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[2]In *Western Business Sys., Inc. v. Slaton,* 492 F. Supp. 513, 514 (N.D. Ga. 1980), plaintiffs asked the trial court to enjoin possible prospective prosecutions using obscenity as a predicate offense for RICO violations. They argued that forfeiture of property acquired with racketeering proceeds acted as a prior restraint on presumptively protected materials. The court held that there was no first amendment problem because the defendants were not entitled to retain racketering proceds, nor were they entitled to property acquired by racketeering proceeds, even if that property consisted of books. The court ruled that denial of the injunction was proper because there was no irreparable harm or likelihood of success on the merits of plaintiffs' claim.

In *4447 Corp.*, the intermediate appellate court invalidated the statutes as applied to obscenity on these grounds: (1) as an impermissible prior restraint; (2) for failure to comply with procedural safeguards; and (3) for failure to employ means that are less restrictive of free expression for regulation of materials presumtively protected by the First Amendment. 479 N.E.2d at 585. That court, however, primarily relied on the theory that the statutes were facially invalid as applied to obscenity because they constituted impermissible prior restraints on protected speech and press. *Id.* A clearly impermissible prior restraint was found because the state had padlocked stores and seized books, magazines, films, and other store property, only a small part of which had been alleged to be obscene. *Id.* at 586. The court was especially concerned that the state's pre-conviction actions had effectively prevented the circulation of presumptively protected materials.

The court also was concerned with the potential post-conviction remedy of forfeiture of defendants' real and personal porperty, including their inventory. The forfeiture remedy extended to presumtively protected materials, and was thus overbroad and facially invalid as a prior restraint. The court rejected the argument that the forfeiture sanctions were not prior restraints, but were merely punishment for criminal offenses, and concluded that forfeiture of licenses or charters were impermissible prior restraints, and noted that the RICO statute:

> may indeed curb the availability of obscenity but cuts a broad swath into the realm of protected expression as well. The consequent overbreadth of these measures with their attendant chilling effect on the exercise of First Amendment rights renders the entire scheme

> constitutionally invalid. We therefore hold that the injunctive remedies of IC 34-4-30.5-2, and the seizure and forfeiture sanctions of IC 34-30.5-3.-4, constitute facially unconstitutional prior restraints in their application to the predicate offense of obscenity.

479 N.E. 2d at 592.

The Indiana Supreme Court vacated the court of appeals' decision and held that the Indiana RICO statutes as they pertain to the predicate offense of obscenity do not violate the first and fourteenth amendments to the United States Constitution. The court decided that the RICO remedies were instituted in an attempt to compel the forfeiture of the proceeds of alleged racketeering activity and not to restrain the future distribution of expressive materials.

We believe the court of appeals' decision and the dissent in the Indiana Supreme Court are better reasoned than the majority opinion from the supreme court. The dissenter stated his "agreement with the thoughtful and thorough opinion" of the court of appeals. Nevertheless, we disagree with the all-or-nothing results of both opinions, invalidating the entire statute or validating it in its entirety, as will be shown below. In interpreting Arizona statutes dealing with obscenity, this court has, when possible, given the questioned statute a constitutional construction. *Book-Cellar.*

4. *Pre-Judgment Remedies*

With the Indiana courts' opinions in mind, we examine the Arizona statutes. A.R.S. § 13-2313 provides that during the pendency of a RICO criminal proceeding pur-

suant to § 13-2312 the superior court may issue an order pursuant to § 13-2314(B)-(C) which provides:

> B. The superior court has jurisdiction to prevent, restrain, and remedy racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312 after making provision for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders.
>
> C. Prior to a determination of liability such orders may include, but are not limited to, entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, the creation of receiverships and the enforcement of constructive trusts, in connection with any property or other interest subject to damages, forfeiture or other remedies or restraints pursuant to this section as the court deems proper.

The state argues that the statutory pre-conviction remedies "do not provide for penalties prior to conviction, but rather only permit a court to preserve the status quo during the pendency of the proceedings." Defendants urge that the statutory scheme for pre-conviction remedies is unconstitutional because it restricts constitutionally protected activities and materials.

Section 13-2314(B) merely gives the court jurisdiction to prevent, restrain, or remedy racketeering by issuing appropriate orders, after consideration for the rights of all innocent persons affected by such violation and after a hearing or trial. We find no problem with this very general provision. Injunctions or restraining orders must comply with rule 65(h), Arizona Rules of Civil Procedure. *Book-Cellar.* Moreover, all orders under § 13-2314(B) would be subject to the limitations stated hereinafter.

Next, we consider the statutory pre-conviction remedies set forth in § 13-2314(C). That section sets forth permissible orders, including, but not limited to, restraining orders or prohibitions, including the acceptance of performance bonds for property subject to damages or forfeiture. The state argues that the purpose of § 13-2314(B) is merely to preserve the status quo. One primary and legitimate purpose of a predetermination order would be to ensure that a copy of an allegedly obscene book or movie is available as evidence. *Heller v. New York,* 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973); *City of Phoenix v. Ellwest Stereo Theater,* 21 Ariz. App. 611, 522 P.2d 567 (1974). Also, the court could take measures to ensure that a defendant would not conceal or dispose of the profits made from the sale of obscene items which would properly be subject to post-conviction seizure. While the court could restrain a defendant from moving inventory in its entirety, it could not interfere with continued exhibitions or sales. *Book-Cellar.* Any order requiring action such as forfeiting any property of the business, forfeiting a defendant's interest therein, or closing the business, prior to determination of liability, would be an impermissible prior restraint. Moreover, a preliminary order may not do what a post-conviction order may not do, as we shall discuss. Given these limitations, § 13-2314(C) is constitutional.

5. *Post-Judgment Remedies*

We turn now to the post-conviction remedies listed under § 13-2314(D), which states:

> D. Following a determination of liability such orders may include, but are not limited to:

1. Ordering any person to divest himself of any interest, direct or indirect, in any enterprise.

2. Imposing reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect the laws of this state, to the extent the constitutions of the United States and this state permit.

3. Ordering dissolution or reorganization of any enterprise.

4. Ordering the payment of treble damages to those persons injured by racketeering as defined in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312.

5. Ordering the payment of all costs and expenses of the prosecution and investigation of any offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312, civil and criminal, including reasonable attorney fees, to be paid to the general fund of the state or county which brings the action.

6. Forfeiture to the general fund of the state or county as appropriate to the extent not already ordered to be paid in other damages:

(a) Any property or other interest acquired or maintained by a person in violation of § 13-2312.

(b) Any interest in, security of, claims against or property, office, title, license or contractual right of any kind affording a source of influence over any enterprise or other property which a person has acquired or maintained an interest in or control of, conducted or participated in the conduct of in violation of § 13-2312.

(c) All proceeds traceable to an offense included in the definition of racketeering in § 13-2301, subsection

D, paragraph 4 and all monies, negotiable instruments, securities, property and other things of value used or intended to be used to facilitate commission of the offense.

7. Payment to the general fund of the state or county as appropriate of an amount equal to the gain that was acquired or maintained through an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312 or that any person is liable for under this section.

The state argues that any order pursuant to § 13-2314(D) is permissible because the defendants have been found guilty of the crime of obscenity and may be punished accordingly.

Subsections (D)(1), (2) and (3) are virtually identical to the Indiana statutory provisions held valid by the Indiana Supreme Court in *4447 Corp.* We agree with the reasoning of the Indiana Court of Appeals in *4447 Corp.*, 479 N.E.2d 578 (Ind. App. 1985), and with the dissent in *4447 Corp.*, 504 N.E.2d 559 (Ind. 1987), that these sanctions act as a prior restraint upon the sale of privileged matter, and that the effect of the restraint is to close bookstores and theatres. The sanctions restrict future, presumptively protected speech, rather than punishing the distribution of unprotected speech in the past. 479 N.E.2d at 591 (Ind. App.). To cite an example posed by defendants, under subsection (D)(1), the owners of bookstores which are not known as "adult" or sexually-oriented bookstores could be ordered to divest themselves of any interest in their stores if one store sold a magazine which is adjudged obscene. *See Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980). Alternatively, under sub-

section (D)(3), the court could dissolve or reorganize the business. Without question, such action would constitute an impermissible prior restraint on protected activities.

Subsection (D)(4) is not applicable to this criminal action because there is no injured person. It apparently creates a private cause of action or right to restitution with treble damages for persons injured through obscenity. *State v. Henderson,* 149 Ariz. 254, 717 P.2d 933 (App. 1986). An award thereunder would not appear to constitute an impermissible prior restraint, any more than would a fine imposed on the defendant, a remedy which has been held not to constitute a prior restraint in *Polykoff v. Collins,* 596 F. Supp. 584 (D. Ariz. 1984), *aff'd,* 816 F.2d 1326 (9th Cir. 1987).

Similarly, subsection (D)(5), allowing a state or county general fund to be reimbursed for the cost of prosecuting a defendant, is not facially invalid because it does not single out protected interests, but rather applies in all RICO criminal actions and is in the nature of a fine. *Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Rev.,* 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983); *Polykoff.* Selling obscene matter is a crime, and the defendants can reasonably be required to reimburse the state or county for costs of prosecution.

The remedy in subsection (D)(6)—forfeiture of interests or proceeds—is proper to the extent that the obscene materials themselves, or proceeds from materials determined to be obscene, may be seized. *State v. A Motion Picture Entled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976); *United States v. Zang,* 703 F.2d 1186 (10th Cir. 1982). Also, as held in *Western Business Systems,* items

of the enterprise could be forfeited if they were gains from other racketeering activity. Racketeering proceeds cannot be laundered merely by being invested in bookstores. *4447 Corp.,* 504 N.E.2d 559 (Ind. 1987).

On the other hand, profits from the sales of protected materials—i.e., items not adjudged obscene—could not be seized. *J-R Distributors,* 725 F.2d at 494, *rev'd on other grounds sub nom., Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985). Also, an order could not forbid the sale of items not yet determined to be obscene. *Universal Amusement Co., Inc. v. Vance,* 587 F.2d 159 (5th Cir. 1978), *aff'd,* 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980). Moreover, the court could not order the seizure of bookshelves, cash registers, or similar items. *Book-Cellar,* 139 Ariz. at 533, 679 P.2d at 556.

Subsection (D)(7), allowing payment to a general fund of an amount equal to the "gain" acquired through the obscenity offense, is constitutional for the reasons just stated. The provisions for forfeiture under A.R.S. § 13-2314(F) are similarly limited as stated above. We note that § 13-2314(F)(3) is unconstitutional to any extent that it purports to allow seizure of property used to facilitate an offense where that property is not itself contraband, or traceable to racketeering proceeds. *United States v. Zang; Book-Cellar.*

The last question facing us is whether, having found some of the RICO remedies unconstitutional as applied to obscenity proceedings, we must declare the entire RICO scheme unconstitutional if applied to obscenity prosecutions. Defendants argue that to leave obscenity as a pred-

icate offense without leaving all of the RICO remedies intact frustrates legislative intent. They argue that the only effect of the partial validation is to elevate a class 6 felony under § 13-3502[3] to a class 3 felony under § 13-2312(C). They submit that the eviscerated version of the statute as applied to obscenity would add nothing to the prosecutorial tools now offered by Arizona obscenity statutes and the provisions of the criminal code. The trial court adopted this reasoning. We disagree.

First, we have not found all the § 13-2314 remedies unconstitutional as applied to obscenity cases. The legislature desired to reach obscenity through the RICO statutes to the extent constitutionally allowed. Where an obscenity statute is in part constitutional and in part unconstitutional, if the parts may stand independently of one another, that which is constitutional may stand, while that which is unconstitutional will be rejected. *Spokane Arcade.*

Second, the legislature, by making obscenity a predicate offense for RICO, and thus punishable as a class 3 felony under § 13-2312, has created a different crime than that set forth in § 13-3502. As noted herein, there are several elements to the crime of illegally conducting an enterprise through obscenity. Commission of the obscenity offense itself is only one element of that crime. Racketeering organizations can operate through the sale of obscenity just as they operate through any other illegal activity proscribed by § 13-2301. The crime of obscenity may be punished because obscenity itself is not protected by

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[3]A.R.S. § 13-3502 has recently been amended so that a violation is a class 5 felony. Laws 1986, ch. 411, § 2.

the first amendment. Correspondingly, conducting an illegal enterprise dealing in obscenity is punishable as a greater offense than the lesser crime of obscenity, just as the RICO statutes make many other crimes more serious when effected through racketeering.

6. *Conclusion*

In conclusion, we have construed the RICO statutes as they relate to a criminal prosecution involving obscenity, such that they pass constitutional muster and do not have a chilling effect on protected rights. The state's remedies against obscenity under RICO are more limited than the state's remedies against other forms of racketeering activity. These limits are required by the federal and state constitutional rights regarding freedom of speech and press. The state can no more expect to reach protected interests by means of the RICO statutes than it could by means of moral nuisance or obscenity statutes. *Book-Cellar; City of Phoenix v. Fine,* 4 Ariz. App. 303, 420 P.2d 26 (1966). As stated in the dissent in *State ex rel. Collins v. Superior Court* [*Scott*]: "Abhorrence of obscenity does not outweigh our duty to uphold the constitutional rights of free speech and free press." Slip op. at 21.

Since we conclude that the trial court erred in declaring that obscenity could not be used as a predicate offense for RICO prosecutions, we vacate the trial court's order granting the motion to dismiss Count I of the in-

dictment and remand for further proceedings consistent with this opinion.

/s/ Robert J. Corcoran
Judge

CONCURRING:

/s/ William E. Eubank
Judge

/s/ Donald F. Froeb
Judge

Supreme Court, U.S.
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No. 87-470

IN THE

Supreme Court of the United States

October Term, 1987

FORT WAYNE BOOKS, INC.,

Petitioner

vs.

STATE OF INDIANA, et al.,

Respondents.

BRIEF OF THE STATE OF INDIANA SUMMITTED IN RESPONSE TO THE REQUEST OF THE SUPREME COURT OF THE UNITED STATES

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SUMMARY OF RESPONDENT'S POSITION

The federal government as well as Indiana and other state governments have enacted statutes (generally called RICO laws) which provide for the seizure and forfeiture of property used or obtained by criminals in a pattern of criminal activity. One of the criminal activities which may support seizure or forfeiture in some jurisdictions is the distribution of obscene material.

The distribution of obscene material is a lucrative crime. People who engage in this lucrative criminal activity are concerned that a vigorous application of RICO laws to their crimi-

nal activity will reduce profits. For that reason, there are a number of active lawsuits challenging the constitutionality of RICO legislation.

The attorney general of Indiana is currently defending the Indiana RICO statute in three cases in the United States District Court for the Southern District of the State of Indiana. It appears to be in the best interests of judicial economy as well as the best interests of the citizens in Indiana to have the Supreme Court of the United States issue a dispositive ruling on the issue of the constitutionality of RICO legislation. Such a ruling, if made after full argument on the merits by the parties, may be of great assistance to state and federal courts which are, or will be, wrestling with the issue.

For the foregoing reasons, the Respondents waived the filing of a brief in opposition to the petition for writ of certiorari under Rule 22.4. Subsequently, counsel for the Respondents was "directed" by the Clerk of the Supreme Court to file a "response" to the petition for certiorari.

Respondents believe that the issues raised by the Petitioners should be addressed and resolved by the Supreme Court of the United States after full argument on the merits.

STATEMENT OF THE CASE

The prosecuting attorney for Allen County, Indiana, filed a petition in a state court under Indiana's civil RICO statute (Indiana Code § 34-4-30.5-1 *et seq.*). The petition alleged that Fort Wayne Books, Inc. and others had participated in a pattern of criminal activity which had resulted in 39 criminal convictions for distributing obscene material. The petition asked for the seizure of the contents of three bookstores in Allen County.

The state court, after an *ex parte* hearing, ordered the seizure of the contents of the bookstores. Although the Indiana statute provides for a prompt adversary hearing on the issue of pre-trial seizure, Fort Wayne Books, Inc. elected to take an interlocutory appeal.

The issues raised by Fort Wayne Books, Inc. in its interlocutory appeal include a constitutional challenge to the application of Indiana's RICO statute to bookstores.

The Supreme Court of Indiana held that RICO laws could be applied to bookstores. Fort Wayne Books, Inc. is asking this court to agree to review the decision of the Supreme Court of Indiana.

On October 30, 1987 counsel for Respondents, State of Indiana, Stephen M. Sims and Stephen Goldsmith waived the filing of a brief in opposition to the petition for writ of certiorari.

SUMMARY STATEMENT OF THE ARGUMENTS IN SUPPORT OF THE RULING OF THE SUPREME COURT OF INDIANA

The Respondents desire to have the relevant issues fully briefed on the merits. In a brief on the merits, Respondents intend to present the following arguments which will be supported by references to relevant case law.

1. It is within the constitutional power of the State of Indiana to establish criminal penalties for the distribution of obscene matter.

2. The State of Indiana may constitutionally seize property used by an individual or organization in a pattern of criminal activity.

3. The State of Indiana may constitutionally seize property which is obtained as a result of a pattern of criminal activity.

4. The State of Indiana may constitutionally seize the property of an organization which is engaged in a pattern of criminal activity.

5. The Indiana RICO statute, which provides for a prompt adversarial hearing and places the burden of proof on the prosecuting attorney, does not deprive defendants of their due process rights.

6. The Supreme Court of Indiana properly found that petitioners were afforded a prompt adversarial hearing and that the proceedings in the trial court were halted by the decision of the petitioners to file an interlocutory appeal.

7. RICO statues are a legitimate and constitutional exercise of the police powers of state and federal governments.

This Court has not directly addressed the question of whether a bookstore can be closed or padlocked as a condition of a criminal conviction or as part of a racketeering or organized crime forfeiture or conviction order. Although it is often argued that a formal or constructive closure is impermissible where the business deals in pornographic and obscene materials, *See*: *Arcara v. Cloud Books, Inc.*, 478 U.S. ____, 92 L.Ed.2d 568, at 574 (1986), this issue is not settled.

Abating obscenity by closure orders as a public nuisance has been approved in certain circumstances in Ohio and Idaho. In Ohio, closure with release provisions for innocent landlords was approved. *State of Ohio, ex rel. Ewing v. Film Entitled "Without a Stich"*, 37 Ohio St.2d 92, 307 N.E.2d 911 (1974), appeal dismissed for want of a substantial federal question *sub nom Art Theatre Guild, Inc. v. Ewing*, 421 U.S. 923 (1975). In Idaho, the state Supreme Court held that a hard-core pornographic bookstore could be closed as a nuisance for one year after final trial establishing the obscenity of the materials as a penalty for past misconduct without being an unlawful prior restraint. *State of Idaho, ex rel. Kidwell v. U.S. Marketing, Inc.*, 631 P.2d 622 (1981). The store owners filed a "civil rights" and declaratory action in federal court. The District Court dismissed that suit on abstention grounds and on the court's "opinion...that the Idaho Moral Nuisance Abatement Act is not flagrantly and patently violative of express constitutional prohibitions in every clause". *U.S. Marketing, Inc. v. Leroy*, 524 F.Supp. 1277, at 1280 (D. Idaho, 1981). The store then filed a direct appeal in this Court, which noted jurisdiction on the issue of closure as a remedy in obscenity nuisance orders, 454 U.:S. 1140 (Jan. 11, 1982). After an arson fire destroyed the

bookstore, the defendant-appellant filed for unilateral dismissal of its appeal under Rule 53. Over the express objection of the State of Idaho, plaintiffs-appellees, the Clerk entered a dismissal of the appeal on March 10, 1982, 455 U.S. 1009. This was not a dismissal "by stipulation of parties" as indicated in *Avenue Book Store v. City of Tallmadge, Ohio*, 459 U.S. 997, 74 L.Ed.2d 393, at 394 (1982) (Justice White dissenting from denial of writ of certiorari).

In the Tallmadge case, the store was enjoined from disseminating any obscene material in the future, rather than closed, but the question of First Amendment impact on obscenity offenses and distribution of hard-core pornography was presented for review by this Court in a way which differs from the concern expressed in *Vance v. Universal Amusement Co.*, 445 U.S. 308, at 317 (1980) (See also, *Vance*, 445 U.S., at 320-25, Justices White and Rehnquist dissenting).

This Court's affirmance in *Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022 (1982), did not relate to the closure or obscenity injunction issues since the Court of Appeals expressed "no opinion with respect to what circumstances, if any, would justify a closure subsequent to a determination that conforms in all respects to the First Amendment", in *Spokane Arcades, Inc. v Brockett*, 631 F.2d 135, at 139 (9th Cir. 1980). The questions were put to this Court, but not resolved here, in *Sequoia Books, Inc. v. Illinois*, ____ U.S. ____, 56 L.W. 3283, 3285 (Oct. 19, 1987), denial of writ of certiorari to the opinion below, at 500 N.E.2d 82 (Ill. App. 1986).

The time is right for a ruling that courts can employ forfeiture and injunction remedies against a business which is proven to be violating obscenity and racketeering laws. State courts, such as those in Ohio, Idaho, Illinois, and Indiana appear ready and willing to fashion careful but strong remedies against illegal traffic in obscenity, and this Court should give them its express approval.

CONCLUSION

Pursuant to Rule 22.4, Respondents expressly waive the filing of a brief in opposition to the petition for certiorari. Respondents suggest that judicial economy may best be served by granting certiorari and allowing the parties to brief and argue the issues on their merits. Respondents expressly reserve argument on the merits until certiorari is granted.

Respectfully submitted,

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MOTION FILED
OCT 30 1987

No. 87-470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

vs.

STATE OF INDIANA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Indiana

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF VIDEO SOFTWARE DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Video Software Dealers Association (VSDA) hereby respectfully requests leave to file the accompanying Brief *Amicus Curiae* in support of Petitioner. VSDA regrets that it must bother the Court with this Motion, but while Petitioner has consented to VSDA's participation, Respondents have refused. Since VSDA believes that this case is a vitally important one, with potentially profound implications for the First Amendment rights of its members and their customers, it has no choice under the rules of the Court but to file this Motion.

VSDA is the primary national trade association of dealers offering prerecorded video programming to the public for purchase or rental. VSDA is composed of over 3,000 regular members, representing 15,000 to 20,000 of the approximately 25,000 retail video store outlets in the United States. In addition, VSDA has an associate membership that includes the major motion picture companies, independent video producers and manufacturers of various products related to the video industry.

Sale and rental of video cassettes for home viewing is a large and rapidly growing industry. The population of video cassette recorders has soared in this decade: in 1980 only 2.7 percent of the nation's television households had such devices, while 49.7 percent of today's television households rely on them to view an average of 75,000,000 films each week rented from retail outlets nationwide.[1] The tremendous ex-

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[1] The *Washington Post* reported on August 28, 1985 the historical 1980 population of VCRs in the United States. *Communications Daily*

pansion of the number of video cassette recorders and corresponding number of retail outlets for rental or sale of video cassettes demonstrate that video cassettes have become a highly desirable and socially prevalent medium of expression that also gives individual consumers freedom to choose what they decide is suitable for viewing in the privacy of their homes.

Given the sizable universe of titles from which VSDA members must choose and the substantial number of titles which they must stock to meet consumer demand, it is inherently impossible for each retailer to review each title. VSDA's members typically carry an average of 2,417 different titles on their shelves, including motion picture films, sporting events, documentaries, musical productions and educational aids.[2] VSDA members choose their inventories from 17,000 titles available for distribution in the United States. Of these titles, the producers have characterized 3,300 to be adult films, generally based on subjective criteria.[3] Of the 77 percent of the retail outlets owned by VSDA members which carry adult films, approx-

reported on August 20, 1987 at 5 the vast increase in these devices, citing Nielsen figures. Statistics on the number of video software rentals per week were supplied to VSDA by Alexander & Associates, a consumer marketing consultant for the home entertainment industry.

[2] Unless otherwise noted, the following factual material is taken from a 1986 VSDA Annual Survey, which is a report on the business operations of a representative group of the regular members of VSDA.

[3] Videolog (video title looseleaf service), issue 33-1, August 14, 1987. These figures represent the number of films economically marketed by typical video retail stores within the United States. Characterizations of the films are made on the basis of distributor information which may not be applicable in certain jurisdictions where standards for what is or is not an adult film may differ.

imately 13 percent of their inventory consists of such materials.

The decision below threatens the ability of VSDA members to continue offering the variety of programming presently available. It employs a state RICO statute, fashioned after the federal statute, to justify the seizure of books, video cassettes, magazines and other material presumptively entitled to First Amendment rights on the basis of an *ex parte* affidavit stating that the material is the product of an enterprise derived from the sale or distribution of obscenity. The Court below did not require any adversarial judicial determination as to whether the seized material was obscene or otherwise comport with any of the requirements that this Court has imposed on those seeking to silence obscene materials.

VSDA is concerned that, if the judgment below is not reversed, it will have a profound chilling effect on video dealers, forcing them to shy away from movies containing nudity or other material that might result in a charge that the movies are obscene, even though many of these movies are classics and winners of numerous awards. This chill is not limited to video dealers, but will also be felt by bookstores, movie theaters and other media of mass communication. Indeed, given the sweep of the RICO statute, the chilling effect of the state court's decision will also extend to those engaged in the distribution and production of artistic, cultural and political works. This case, therefore, raises serious constitutional concerns and has implications far beyond Indiana, since the Indiana statute at issue here is similar to the RICO laws of other states and to the federal RICO statute.

As the representative of the nation's video cassette industry, VSDA believes that its participation in this proceeding will facilitate the Court's understanding of the issues raised and their implications for the full, free, and unfettered enjoyment in the privacy of the home of programming that video cassettes have made available to the American people. Accordingly, VSDA respectfully requests leave to file a Brief *Amicus Curiae* in the above-captioned case.

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No. 87-470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Indiana

BRIEF OF VIDEO SOFTWARE DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE

The interests of the Video Software Dealers Association (VSDA) as *amicus curiae* is set forth in VSDA's accompanying motion for leave to file this brief.

REASONS FOR GRANTING THE WRIT

I

THIS CASE WILL CLARIFY NATIONWIDE THE MANNER IN WHICH RICO STATUTES MAY BE EMPLOYED WHERE THEY AFFECT FUNDAMENTAL FIRST AND FOURTEENTH AMENDMENT RIGHTS.

This case deals with the power of a State to use its RICO statute to seize, on the basis of an *ex parte* affidavit, material presumptively protected by the First Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment. The decision below upheld the abrupt padlocking of bookstores and seizure of their books without affording their owners either a prompt opportunity to contest whether any of the seized material was obscene or a prompt opportunity to seek appellate review of any initial determination that it was obscene. These actions were taken without any allegation that all, or even a substantial proportion, of the materials seized were obscene.

The Indiana statute which authorized these actions is modeled after the federal Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1961 *et seq.* It is similar to the RICO statutes adopted by at least nine states that are modeled on the federal statute and that make obscenity a predicate to seizures and penal forfeitures. Thus, the decision below,

while decided on the basis of the Indiana statute, will color the manner in which prosecutors may apply the federal and other state statutes as well. Unless reversed, the decision below will sanction the preemptive use of RICO statutes by prosecutors across the nation to silence rights protected by the First Amendment.[1]

The Indiana Supreme Court justified the confiscation of the books, magazines and other material here on the grounds that the seized material was the product of an enterprise derived from unlawful activity. The Court reasoned that the RICO statute and seizure were not intended to restrain the exercise of speech, but rather to deny to those engaged in unlawful criminal activities the fruit of their illegal pursuits. This decision places squarely in issue whether a RICO statute may be treated solely as a penal enforcement vehicle without reference to First Amendment standards developed over two decades by this Court. Such a theory directly conflicts with this Court's decisions holding that statutes cannot be tested solely by ref-

[1] Federal prosecutors have already commenced the first federal RICO cases predicated upon alleged violations of obscenity statutes. *United States v. Pryba et al.*, E.D. Va., No. CR 87-00208-A (indictment filed August 13, 1987); *United States v. Sturman et al.*, D. Nev., No. CR-S-87-278 (indictment filed Oct. 7, 1987). As the Indiana Supreme Court noted, under the federal RICO statute, convictions for the predicate offense are not required to order a seizure. 504 N.E.2d at 566. As a result, federal prosecutions can proceed in the same manner as in this case, with federal prosecutors seeking *ex parte* orders seizing expressive material and associated neutral instrumentalities on the basis of alleged obscene material not yet subject to trial or appellate review. *See J.N.S., Inc. v. State of Indiana*, 712 F.2d 303, 306 (7th Cir. 1983).

erence to their alleged purpose, but must be assessed by their effect and operation and by the nature of the rights involved. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *Near v. Minnesota*, 283 U.S. 697, 708 (1931). *Cf. Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 1722, 1727 (1987) ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment").

This case is of substantial importance to the public because it affects their ability to view programming and acquire books presumptively protected by the First Amendment. Under the decision below, prosecutors need not prove that a criminal enterprise exists or that the speech involved is obscene before seizing the contents of bookstores or other media outlets. Instead, it is sufficient that a probable cause affidavit be filed *ex parte* to shut down a business, with a trial only being required after a "reasonable time." In petitioner's case, that "reasonable time" included an entire year during which its bookstores were padlocked before a stay of the underlying *ex parte* order was granted. The decision below would also allow seizure, en masse, of books, video cassettes and other media of mass communications that are not obscene but are fully subject to the First Amendment's protection as long as an affidavit was submitted alleging that those media were acquired with the products of a criminal activity. Finally, the decision below permits the government to close outlets for protected First Amendment expression solely because two or three of the thousands of items disseminated through those outlets are unprotected.

II

THE USE OF A RICO STATUTE TO RESTRAIN PRESUMPTIVELY PROTECTED SPEECH ON THE BASIS OF PREVIOUS UNPROTECTED SPEECH RAISES EXTREMELY IMPORTANT FEDERAL QUESTIONS WHICH THIS COURT SHOULD RESOLVE.

A. The Decision Below Subjects Distributors of Protected Speech to Prior Restraints.

The Indiana Supreme Court upheld seizures of large quantities of material before there was any showing in an adversarial proceeding that the material itself was obscene, and without a prompt judicial determination after the seizures that the material was obscene. The seizures directly prevented the owners of the bookstores from exercising their First Amendment right to distribute books of their choosing because all of the items necessary to conduct the business were also seized. Under these circumstances, the decision below countenances a classic prior restraint that can be justified under the First Amendment only by the most compelling governmental interests. *Near v. Minnesota*, 283 U.S. 697 (1931). No attempt was made below by the government to meet that standard.

Numerous decisions have condemned ordinances and statutes authorizing revocation of adult theatre business licenses based on previous distribution of obscene materials as incompatible with the First Amendment because they impose a prior restraint on presumptively protected expression. *E.g., City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir.), *cert. denied*, 107 S.Ct. 316 (1986); *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Entertainment Concepts, Inc., III v. Maciejewski*, 631

F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). If revoking business licenses as punishment for obscenity convictions is a prior restraint, then seizing a business altogether, with or without previous obscenity convictions, must *a fortiori* be an unconstitutional abridgement of First Amendment rights.

Indeed, the considerations on which the prosecution, and ultimately the Indiana Supreme Court, sought to justify the seizure of materials here are analogous to the considerations that most lower courts have found to be inadequate to sustain so-called "padlock" laws against First Amendment challenge. Those laws authorize the government to close a place of business in response to previous obscenity convictions. While a substantial number of state statutes have relied on the nuisance rationale to control obscene speech in this manner, few of these statutes have been upheld because they act as prior restraints on protected speech. *Compare Universal Amusement Co. v. Vance*, 587 F.2d 159 (5th Cir. *en banc* 1978) (nuisance statute providing for 1 year closure of businesses distributing obscene materials held an unconstitutional prior restraint), *aff'd on other grounds*, 445 U.S. 308 (1980) *with State ex rel. Kidwell v. U.S. Marketing, Inc.*, 102 Idaho 451, 631 P.2d 622 (1981), *appeal dismissed*, 455 U.S. 1009 (1982) (upholding constitutionality of nuisance abatement statute).

The Indiana Court of Appeals in its thorough analysis of this case, analogized the Indiana statute to the padlock laws, 479 N.E.2d at 587-90, and found that statute unconstitutional. It noted that "'evidence of obscene conduct in the past does not justify enjoining future conduct which is protected by the First Amendment...,'" *id.* at 588 (citation omitted), and that

the padlock cases establish that the "*Near* doctrine not only extends to the bookstore premises and to their inventories of films and publications, but also forbids the confiscation or forfeiture of the neutral instrumentalities used for communicative purposes as well." *Id.* at 589. The State Supreme Court decision sidesteps these holdings and its conclusion conflicts with the vast weight of constitutional authority setting forth a "longstanding hostility to any system of prior restraints under our [federal] Constitution." *Id.* at 592.

B. The Decision Below Ignores Virtually Every Supreme Court Decision Over the Last Twenty Years Dealing With the Regulation of Obscene Speech.

The Indiana Supreme Court treated this case as if it were a RICO enforcement action against illegal enterprises involving gambling, drugs or other contraband, and ignored the serious First Amendment difficulties posed by its analysis. In so doing, it ignored the decisions of this Court holding that standards for suppressing gambling and similar crimes cannot establish the level of constitutional protection for regulations aimed at expressive activity. *E.g., Vance v. Universal Amusement Co.*, 445 U.S. at 315 (regulation of communicative activity requires more narrowly drawn procedures than those necessary for abatement of ordinary nuisances); *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 211-12 (1964) (standards for search and seizure of materials presumptively protected by First Amendment are higher than those for other contraband); *Marcus v. Search Warrant*, 367 U.S. 717, 730-31 (1961)(searches and seizures).

The result of this faulty premise is that the court failed to honor basic First Amendment requirements. As Petitioner has described to this Court, the Indiana Supreme Court's decision conflicts with decisions:

- requiring notice and prior adversarial hearing before authorizing seizures and padlocking of businesses engaged in First Amendment activity. *E.g., Heller v. New York*, 413 U.S. 483 (1973); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979).

- invalidating interim seizures and padlocking orders of indefinite duration. *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980); *Freedman v. Maryland*, 380 U.S. 51 (1965).

- requiring prompt appellate review of interim or permanent restraints on speech. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

- suggesting the unconstitutionality of restraints based only upon a probable cause standard of proof of obscenity. *California ex rel. Cooper v. Mitchell Bros.*, 454 U.S. 90 (1981).

The effect of ignoring these constitutional requirements is to deny speakers such as VSDA's members and their customers basic First Amendment protections. These decisions reflect this Court's careful and deliberative refinement over twenty years of the appropriate balance between the rights of free speech and governmental efforts to regulate obscene speech. The asserted ability of the State of Indiana to avoid these requirements altogether by relying on a RICO enforcement scheme raises critical constitutional questions that this Court should address.

C. The Decision Below Will Produce a Substantial Chilling Effect on the Distribution of Protected Speech.

The sweeping effect of the decision of the Indiana Supreme Court will have a substantial chilling effect on every distributor and retailer of video cassettes across the nation. The Indiana statute is modeled after the federal RICO statute as are many other state statutes. Federal prosecutors are already using the federal statute in a fashion sanctioned by the Indiana court and it is not unreasonable to assume that other states will follow suit. Faced with the seizure of their entire stock in trade and padlocking of their stores, video dealers, just as any other business person, will naturally avoid any materials which present a risk of drawing RICO prosecutions.

Given the large number of video cassette titles and the obvious impossibility of reviewing each title individually, dealers may avoid distributing all but the most innocuous materials. Dealers will not even be able to rely solely on traditional movie ratings for fear that prosecutors in a particular jurisdiction will allege two or more of the R-rated materials are obscene and thus subject a dealer to RICO enforcement actions. *Cf. Jenkins v. Georgia,* 418 U.S. 153 (1974) (reversing state court holding film "Carnal Knowledge" to be obscene).

The drastic sanctions of the RICO statute, which the court below held could be imposed on the basis of no more than an *ex parte* affidavit, can put a distributor of protected speech out of business either temporarily or permanently. When the material seized is not in fact obscene, the act of confiscation has caused a truly irreparable injury to both the dealer and its customers. *Elrod v. Burns,* 427 U.S. 347, 373

(1976) (loss of First Amendment freedoms for even a minimal period "unquestionably constitutes irreparable injury"). Even where some of the seized materials are ultimately held obscene, seizing the entire contents of a bookstore, including all the protected material and neutral instrumentalities within the store, prevents the bookstore owner from engaging in rights protected by the First Amendment. In either case, the chilling effect of the decision below will extend to protected speech far from the boundaries of obscenity, simply because the government's enforcement tool is so indiscriminate. Before the chill is felt widely, this Court should review the decision below to resolve the serious First Amendment questions at issue.

CONCLUSION

For the reasons set forth herein, VSDA urges that this Court grant a writ of certiorari to the Supreme Court of the State of Indiana in order to review the serious constitutional issues raised below.

Respectfully submitted,

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No. 87-470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

v

STATE OF INDIANA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PHE, INC. IN SUPPORT OF PETITIONER

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October 30, 1987

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-470

FORT WAYNE BOOKS, INC.,
Petitioner,

v.

STATE OF INDIANA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

PHE, Inc. hereby respectfully moves for leave to file the attached brief *amicus curiae*. The attorney for petitioner has consented; the attorney for respondent has refused consent.

PHE, Inc. ("PHE") is a North Carolina corporation engaged in the business of mailing throughout the nation various materials protected by the First Amendment, including sexually explicit materials, contraceptives and newsletters. In the past year, PHE has had first-hand experience with the increasing efforts of law enforcement officials to restrict the distribution of sexually explicit speech. PHE was prosecuted in Alamance County, North Carolina for distributing materials that had been cleared by law enforcement officials in adjacent Orange County, North Carolina. The jury acquitted PHE after deliberating for less than one hour. Nevertheless, federal prose-

cutors in North Carolina and Utah have also stated that they are seriously considering prosecuting PHE, and the Utah officials have insisted that to avoid prosecution PHE must discontinue *nationwide* its sale of sexually oriented material, regardless of whether that material is obscene. PHE has substantial reason to believe that this prosecution will include counts based on the federal RICO statute.

PHE wishes to participate in this case to explain the constitutional infirmities of the Indiana RICO statute from the perspective of a national distributor. PHE also wishes to focus on a fundamental constitutional infirmity in the statute which is not fully addressed in the petition: the First Amendment does not permit forfeiture of all of a speech establishment's assets, including thousands of books and magazines that are not alleged to be obscene, based solely on the expressive activities of that establishment. Because the seizure and padlocking at issue here were for the sole and express purpose of facilitating forfeiture of these assets, the unconstitutionality of such forfeiture compels the conclusion that the seizure and padlocking were also unlawful.

For the foregoing reasons, PHE respectfully urges the Court to accept and file the enclosed brief *amicus curiae*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-470

FORT WAYNE BOOKS, INC.,
Petitioner,

v.

STATE OF INDIANA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

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BRIEF AMICUS CURIAE OF PHE, INC. IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

PHE, Inc. ("PHE") is a North Carolina corporation engaged in the business of mailing throughout the nation various materials protected by the First Amendment, including sexually explicit magazines and videotapes, contraceptives, a medical newsletter entitled "Sex Over Forty" (which is edited by a physician), and a newsletter entitled "Executive Health Report." PHE's sexually explicit speech is sent only to adults, and only upon request.

PHE has taken great care to assure compliance with state and federal obscenity laws. The company has requested advice from law enforcement officials in North Carolina and elsewhere, and has met with law enforcement officials, to ensure that no arguably obscene material is distributed by PHE. PHE has strictly abided by the advice it has received.

Despite these efforts, on August 4, 1986, PHE was indicted in Alamance County, North Carolina for the distribution of videotapes and magazines that had been cleared for distribution by attorneys and law enforcement personnel in Orange County, North Carolina (PHE's principal place of business). At trial, a government witness admitted that the materials at issue entered Alamance County (which is a conservative, rural community) only after a law enforcement official obtained a post office box and requested those materials. After less than an hour of deliberation, the jury acquitted PHE of all charges.

Notwithstanding the jury's verdict in this state prosecution, federal prosecutors in North Carolina and Utah have informed PHE that prosecution of PHE under federal obscenity laws is under serious consideration. PHE has substantial reason to believe that this prosecution will include counts based on the federal RICO statute. In pre-indictment negotiations, federal prosecutors in Utah have insisted that to avoid prosecution on felony charges, PHE must discontinue *nationwide* its sale of *any* sexually oriented material, regardless of whether that material is protected by the First Amendment.

In a RICO prosecution, PHE's entire business could be forfeited if PHE is found to have distributed two or more videotapes or magazines that were obscene *in any community* in the United States during the past ten years. The existence of this draconian sanction creates extreme pressure on PHE to accede to the demands of

federal prosecutors that it severely curtail its speech activities in all communities, despite PHE's belief that all of the materials it has distributed are non-obscene and thus constitutionally protected.

As PHE's experience has made it acutely aware, the application of state and federal RICO statutes—which employ "new weapons of unprecedented scope" in order to eradicate the targets of RICO prosecutions, *Russello v. United States*, 464 U.S. 16, 27 (1983)—to expressive activities is fundamentally at odds with the guarantees of the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States Marketing, Inc. v. Idaho*, 454 U.S. 1140 (1982), this Court noted probable jurisdiction over an appeal concerning the constitutionality of enjoining a speech business as a nuisance because it had sold obscene materials, but the Court subsequently dismissed that case pursuant to Supreme Court Rule 53. In *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172 (1986), the Court ruled 6-3 that application of a nuisance statute to a bookstore was constitutional where this was based *solely* on unlawful sexual activities on the premises and had "nothing to do with books or other expressive activities." 106 S. Ct. at 3178. Justice O'Connor, joined by Justice Stevens, wrote a special concurrence to emphasize that if the statute had been used to "clos[e] down a bookstore because it sold indecent books . . . the case would clearly implicate First Amendment concerns." 106 S. Ct. at 3178.

The government's prosecution in this case raises the substantial question left unanswered in *United States Marketing, Inc.* and *Arcara*. The prosecution does not allege that the three bookstores at issue engaged in any unlawful non-expressive activities, but instead seeks forfeiture of all of their speech materials and business assets because those bookstores sold some obscene books

in the past. Pursuant to an order issued after an *ex parte* hearing, the government has prevented petitioner from distributing lawful speech materials by padlocking petitioner's three bookstores and by seizing their entire contents, *including thousands of books and films that are not even alleged to be obscene.* The prosecutor has filed a petition seeking forfeiture of the bookstores, their contents, and all of petitioner's corporate assets. Appendix to the Petition For a Writ of Certiorari ("Pet. App.") at 35.

The State's action in seizing, padlocking and seeking forfeiture of the assets of these bookstores pursuant to a RICO statute raises extraordinarily important First Amendment questions. Many of these questions have been thoroughly addressed in the petition and will not be discussed here.[1] *Amicus* will focus on an important question that is integral to both the seizure and padlocking issues in this case: whether the First Amendment permits forfeiture of a speech establishment's assets, including constitutionally protected films and books (and proceeds therefrom), based solely on a finding that some of the establishment's expressive activity in the past violated the obscenity standards in at least one community. If the First Amendment does not permit the forfeiture sought

[1] As petitioner explains, the state statute authorizing this mass seizure fails to provide the procedural safeguards required in *Marcus v. Search Warrants, etc.*, 367 U.S. 717 (1961) and its progeny. For example, the statute does not provide for notice or an adversary hearing prior to a mass seizure of speech materials, fails to provide for a prompt and *final* decision (as opposed to a hearing) on the propriety of the seizure and padlocking, and fails to provide prompt appellate review of the lower court's mass seizure and padlocking order. In fact, the Indiana appellate courts failed to rule on petitioner's app[illegible] for a stay of that order for more than a year, and acted [illegible] Justice Stevens, acting as Circuit Justice, ordered respondents [illegible] response to petitioner's stay application.

in this case, then *a fortiori* it is unconstitutional to padlock a bookstore and seize its contents for purposes of eventual forfeiture, even if procedural safeguards are provided. The Indiana Court of Appeals squarely held that the RICO statute's forfeiture provisions violate the First Amendment, Pet. App. 44, 80, but that holding was reversed by the Indiana Supreme Court. *Id.* at 14-15.

The constitutionality of the Indiana seizure, padlocking and forfeiture provisions is an issue of immense importance because the federal government and many state governments have adopted very similar RICO statutes for the express purpose of closing down establishments targeted for prosecution. Those statutes have had precisely that effect on speech establishments in some jurisdictions, and the United States Department of Justice has urged other states to adopt and enforce such statutes against speech establishments. *See, e.g.*, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 498 (July 1986).

The use of a regulatory mechanism that intentionally silences protected speech because of past obscenity violations in inconsistent with this Court's decisions condemning prior restraints, *Point I*, and its consistent holdings that government regulation of unprotected expression must be narrowly drawn to avoid both direct governmental suppression of lawful speech, and also self-censorship of lawful speech. *Point II.* Indeed, the use of RICO statutes allows the standards of a single community to silence the speech activities of a national distributor like PHE *in all communities*, because the distribution of material deemed obscene in any community can be the predicate for forfeiture of all of that establishment's assets.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE THREATENED FORFEITURE OF THREE BOOKSTORES AND ALL OF THEIR ASSETS, INCLUDING LAWFUL BOOKS AND FILMS, CONSTITUTES AN UNLAWFUL PRIOR RESTRAINT.

In *Near v. Minnesota*, 283 U.S. 697 (1931), this Court said that a central purpose of the First Amendment was to eliminate prior restraints on speech, and held that a "statute must be tested by its operation and effect" to determine whether it imposes such a restraint. 283 U.S. at 708, 713.[2] The "operation and effect" of Indiana's RICO statute, like the federal RICO statute on "which the Indiana statute was patterned," Pet. App. at 10, could not be clearer: both the purpose and effect of RICO statutes is to destroy the economic foundation of targeted businesses, and thereby eradicate those businesses. *Russello*, 464 U.S. at 27. When this "'extraordinary' weapon"[3] is aimed at speech establishments, based solely on a finding that some of their expressive activities have been unlawful, its operation and effect is to prevent those establishments from engaging in other, presumptively constitutional expressive activities.

The penalties provided by RICO (and, in particular, the forfeiture provisions) are expressly designed to "incapacitate" businesses prosecuted under RICO. 116 Cong. Rec. 19855 (1970) (remarks of Sen. McClellan). Although the original purpose of this powerful weapon was to "eradicat[e] organized crime in the United States," *United States v. Turkette*, 452 U.S. 576, 589 (1981), the

[2] *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315 n.13 (1980); *Organization for a Better Austin v. Keefe*, 402 U.S. 414, 418-19 (1971); *Carroll v. Commissioners*, 393 U.S. 175, 181 & n.5 (1968).

[3] *Russello*, 464 U.S. at 27 (quoting Senator Hruska).

reach of the federal and state RICO statutes is far broader and permits RICO prosecutions against any speech business which has violated state or federal obscenity laws on at least two occasions.[4] As applied to speech establishments, the Indiana RICO statute is *not* limited to disabling the business from disseminating only specific expressive works previously found to be unprotected, or even unprotected expression in general. The plain purpose of RICO in this context is to completely shut down speech establishments if they have engaged in two or more unlawful speech activities in the past. Thus, the inevitable effect of RICO, as applied to speech establishments, will be to disable them from disseminating even lawful expression.

This purpose and effect was expressly recognized in the Meese Commission's Report on Pornography, which urged states to adopt and enforce RICO statutes precisely because they provide "an effective means to *substantially eliminate*" businesses that engaged in some unlawful speech in the past. ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 498 (July 1986) (emphasis added). *See also id.* at 464 (enforcement of forfeiture provisions "could literally put [such enterprises] out of business"). A recent *Wall Street Journal* article reports that 12 states now "list obscenity as a crime that can be prosecuted under their RICO laws." Wall St. J., Aug. 25, 1987, at 25. Because of the nature and severity of RICO penalties, law enforcement officials in these states can use prosecutions, or even the threat of RICO prosecutions, to "eliminate" speech establishments. Law enforcement officials in Fort Lauderdale and Orlando, Florida have already successfully used that

[4] *See generally Sedima, S.P.R.L. v. Imrex Co.*, 87 L.Ed.2d 346, 377 (1985) (Powell, J., dissenting) ("RICO has been interpreted so broadly that it has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended target of the statute.").

state's RICO statute to close down bookstores because of their expressive activities. *Id.*

In *Near*, this Court squarely held that where a statute had the purpose, or the operation and effect, of suppressing lawful expression, the statute violated the First Amendment. 283 U.S. at 711-15. In both purpose and effect, the nuisance abatement statute at issue in *Near* and the RICO statute at issue here are remarkably similar. The "reason for the enactment" challenged in *Near* was Minnesota's determination that traditional "prosecutions to enforce penal statutes for libel do not result in 'efficient repression or suppression'" of libelous speech. 283 U.S. at 711. The reason for the enactment of the RICO statute at issue here was Indiana's determination that traditional prosecutions to enforce penal statutes for obscenity were not efficiently repressing or suppressing obscenity. Accordingly, in *Near*, the State of Minnesota had decided that instead of prosecuting individual criminal libels as they occurred, Minnesota would authorize the abatement of the "business" or economic base from which those libels had emanated. 283 U.S. at 17. Similarly, Indiana has decided that instead of prosecuting individual obscene materials as they occur, Indiana will authorize the forfeiture (and thus closure and abatement) of the "enterprise" or economic base from which those obscene materials emanated. In *Near*, the Court ruled that "[c]haracterizing the publication as a business and the business as a nuisance does not permit an invasion of the constitutional immunity against restraint." 283 U.S. at 20. *Near* thus holds that government cannot constitutionally authorize closure of a speech business simply because that business has engaged in unlawful speech in the past. As applied to expressive activities, RICO statutes are specifically designed to close down speech establishments solely because they engaged in unlawful speech in the past. Accordingly, the judgment of the Indiana Supreme Court that Indiana's RICO statute is constitutional is directly inconsistent with this Court's

holding in *Near*. *See* S. Ct. R. 17.1(c) (important consideration favoring grant of certiorari is state court's resolution of "a federal question in a way in conflict with applicable decisions of this Court").

In fact, the prior restraint upheld by the lower court is far more suppressive than the restraint at issue in *Near*, because Indiana would effectively terminate *all* speech activities (lawful or otherwise) by the speech establishments it prosecutes, while the injunction in *Near* only restrained the defendants from publishing "a malicious, scandalous or defamatory newspaper, as defined by law." 283 U.S. at 706. *See also Vance*, 445 U.S. 308 (holding that injunction against use of premises for "commercial manufacturing, commercial distribution, or commercial exhibition of obscene material" pursuant to state nuisance statute was an unconstitutional prior restraint on speech).

Notwithstanding the Court's decisions in *Near*, *Vance* and other prior restraint cases, many states continue to bring civil nuisance actions, and more recently criminal RICO actions, against speech businesses in an effort to terminate all of their speech activities solely because they have engaged in unlawful expressive activities in the past. Although a very substantial majority of lower courts has found such actions unconstitutional,[5] a few courts have upheld their constitutionality.[6] The Court should therefore grant certiorari because "a state court of last resort has decided a federal question in a way in conflict with the decision of" many other state courts of last resort and also "a federal court of appeals." S. Ct. R. 17.1(c).

In addition to the importance of settling this conflict between and among different state and federal jurisdic-

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[5] See the cases collected in the Petition at 21-22 n.4.

[6] *See, e.g., Fehlhaber v. State*, 675 F.2d 1365 (4th Cir. 1982); *Western Business Systems, Inc. v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980); *State ex rel. Kidwell v. U.S. Marketing Inc.*, 102 Idaho 451, 631 P.2d 622 (1981).

tions, the issue raised here is of growing importance because law enforcement officials are increasingly invoking closure and forfeiture sanctions against speech establishments. Indeed, as *amicus* will explain, the mere threat that these sanctions may be invoked substantially chills constitutionally protected speech. In these circumstances, it is essential that this Court grant review to determine whether the First Amendment permits such "extraordinary weapons" to be aimed at speech establishments based solely on their expressive activities. S. Ct. R. 17.1 (c) (important reason favoring grant of certiorari is highest state court's resolution of "an important question of federal law which has not been, but should be, settled by this Court").

II. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE INDIANA STATUTE IS NARROWLY DRAWN TO AVOID DIRECT GOVERNMENTAL SUPPRESSION OF LAWFUL SPEECH, AND ALSO SELF-CENSORSHIP OF LAWFUL SPEECH.

The Court has consistently stressed that because "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished, is finely drawn. . . . [t]he separation of legitimate from illegitimate speech calls for sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1959). In particular, statutes regulating speech "must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 522 (1972). Accordingly, this Court has required that statutes regulating obscenity be narrowly drawn to avoid both direct governmental suppression of lawful speech, and also self-censorship of lawful speech.[7]

[7] *See, e.g., Miller v. California*, 413 U.S. 15, 24 (1973) ("statutes designed to regulate obscene material must be carefully limited");

The forfeiture remedy of the Indiana RICO statute plainly violates both of these constitutional requirements. Rather than being carefully limited to unlawful speech, or to the proceeds from unlawful speech, the statute also authorizes forfeiture and thus direct suppression of speech materials that are not alleged to be obscene or otherwise unprotected—books, videotapes, magazines, bookcases, projectors and other assets used to distribute and exhibit protected speech—and proceeds from the sale of protected speech. In this case, the State seeks forfeiture of thousands of books and films without even alleging that they are obscene. In short, the direct consequence of this statute is suppression of an extraordinary amount of constitutionally protected speech.[8]

In addition to this direct governmental suppression of protected speech, RICO statutes are certain to cause self-censorship of a substantial amount of protected speech. RICO makes the sale of even small quantities of obscene material a "poison pill." If a business sells any obscene material, all of the assets of that business are

Carroll, 393 U.S. at 183-84 ("An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order."); *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963) (regulation of obscenity must "conform to procedures that will ensure against the curtailment of constitutionally protected expression"); *Smith v. California*, 361 U.S. 147, 152, 155 (1959).

[8] The Indiana Supreme Court's view that such protected materials could be forfeited, like other "contraband," simply because of their association with unprotected speech, regardless of whether forfeiture has the effect of suppressing protected speech, is in direct conflict with the principles adopted in this Court's prior decisions. These cases recognize that speech, unlike other "contraband," is entitled to special protection to assure that constitutionally protected speech is not suppressed. *See, e.g., Marcus v. Search Warrant of Property*, 367 U.S. 717, 730-31 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205, 211-12 (1964); *cf. Vance*, 445 U.S. at 315-16.

jeopardized, as well as the assets of any related business entities (subsidiaries, parent corporations, nonprofit corporations, etc.). Because of the "dim and uncertain line" separating protected speech from obscenity, many speech businesses (including businesses that engage in some speech activities and some other activities) will not place all of their corporate assets at risk by distributing any materials that could even conceivably be found obscene in any community. For speech businesses, the only sure way to eliminate the risk of forfeiture under RICO is to cease distributing any sexually explicit speech.

As a national distributor of many products, including some sexually explicit materials, *amicus* is acutely aware of the risks that RICO statutes create when obscenity is included as a predicate offense. Under the federal RICO statute, for example, PHE could be subject to forfeiture of its entire nationwide business merely because in two isolated instances in any community (or communities) in the United States, a magazine or videotape PHE distributes is found to violate local obscenity law. Given the wide variety in temperament and outlook among the thousands of communities in this nation, a distributor such as PHE cannot possibly discern or predict community values for every location from which it receives a request to ship sexually explicit materials. PHE's recent experience in North Carolina illustrates this problem. Following prosecutorial advice about particular speech materials in one county did not shield PHE from a prosecution in an adjoining county (initiated after law enforcement officials surreptitiously requested that this material be mailed into that county) based on the very same materials. Because of the inherent difficulties of complying with varying community standards across the nation, a prudent nationwide distributor can only avoid the risk that its business will be closed down under a state or federal RICO statute by limiting distribution

to expression that poses *no* risk of offending the standards of *any* community.

The draconian approach employed in RICO statutes thus pressures distributors to censor their speech nationally in order to satisfy the standards of the least tolerant communities. It also gives local communities a powerful tool to compel that result. By showing that a speech establishment has twice distributed obscene materials in its community, a community can use a RICO prosecution to forfeit—to that community—all of the proceeds of that establishment's sale of *lawful* materials in other communities, and can effectively shut down further speech activities by that business in all communities.[9] For these reasons, the forfeiture remedy in RICO statutes is in direct conflict with the principle, if not the holding, in *Miller* that obscenity law should accommodate the varying tolerance levels of diverse communities. *Miller v. California*, 413 U.S. 15, 30, 32 (1973).[10] *See* S. Ct. R. 17.1(c).

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[9] This is true even if the two materials found obscene in the community where a prosecution is commenced would be found not obscene and thus constitutionally protected in other communities.

[10] The danger that particularly intolerant communities can use RICO's extreme penalties to impose their standards on other communities is not chimerical. As explained *supra*, backed by the force of the federal RICO statute, federal prosecutors in Utah have insisted that PHE discontinue the sale of any sexually explicit materials anywhere in the nation. Furthermore, under the federal RICO statute, federal prosecutors can pre-determine the least tolerant community in America, can surreptitiously solicit the mailing to that community of sexually explicit materials they know would be tolerated in every other community, and can then use these solicited mailings to prosecute under RICO and obtain the forfeiture of the business' entire inventory and the proceeds of all of its lawful sales to other communities. As explained earlier, the prosecution of PHE in rural Alamance County, North Carolina, was based on materials that had been surreptitiously requested by a law enforcement official there.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to grant the petition for certiorari.

Respectfully submitted,

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Statement

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, and the International Periodical Distributors Association, Inc., (collectively referred to as *amici*) hereby respectfully move for leave pursuant to Rule 42 of the Rules of the Supreme Court of the United States to file the attached brief *amici curiae* in this case. The consent of the attorney for petitioner has been obtained and filed with the Court. The consent of the attorney for respondents was requested but refused.

The *Amici*

The *amici*'s members publish, produce, distribute, and sell books, magazines, and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is the major national association of booksellers in the United States. ABA has approximately 5,200 members consisting of private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is the major national association in the United States of publishers of general books, textbooks and educational materials. Its members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is the national trade association for over four hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

Interest of the *Amici*

The interest of the *amici* reflects their continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on materials with sexual content. *Amici*'s brief will demonstrate how the legal principles involved in this case impact upon those who produce, distribute and sell material which is not obscene.

Although the case *sub judice* involves "adult" bookstores, the RICO statute upheld by the Indiana Supreme Court, and similar RICO statutes in other jurisdictions,[1] are by no means limited to businesses which deal primarily in sexually explicit materials. In fact the padlocking of stores and massive seizure of printed materials involved in the two cases decided below did not distinguish between obscene and First Amendment protected materials. Everything was seized. The statute is drawn so broadly that it permits the massive seizure and forfeiture of assets, including non-obscene books and periodicals, from a business that does not carry a single obscene title but is shown only to have violated provisions relating to materials deemed "harmful to minors." Such a harsh possible result obviously chills the exercise of First Amendment rights by the legitimate booksellers, distributors and publishers who are the members of *amici*.

This concern of legitimate businesses is not unwarranted. There has been rising agitation directed against booksellers, publishers and distributors handling First Amendment protected materials. *Amici* cite but a few troubling recent examples. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but which were adjudged to be protected by the First Amendment. See *Council for Periodical*

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[1] The Indiana RICO statute is modeled after the Federal RICO statute (18 U.S.C. § 1961 *et seq.*) and is similar to the RICO statutes of many other states.

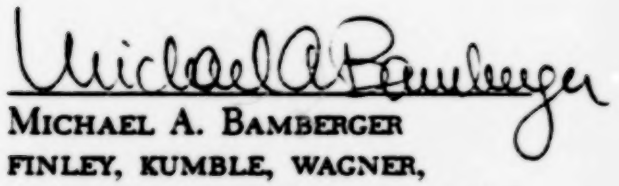
Distributors Association v. Evans, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd* 11th Cir. Nos. 86-7569, 86-7754 (Sept. 17, 1987). At the national level, the Attorney General's Commission on Pornography ("Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order requiring the retraction of the charge and advice to the recipients that earlier communications from the Commisssion were of no legal effect and to be ignored. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986). In its subsequent July 1986 report, the Commission not only endorsed broad new law enforcement initiatives, but also encouraged "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment.

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides an effective means to substantially eliminate obscenity businesses." Attorney General's Commission on Pornography, *Final Report* at 435, 498 (July 1986). Although the Commission did not say so, RICO also provides an effective means to eliminate legitimate businesses which may have inadvertently crossed the gray line between what is obscene and what is not, as well as an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which may not meet with the approval of a faction in the community.

Unless the Court reaffirms the existing doctrine relating to prior restraints, and continues to insist on adequate procedural safeguards where seizures of presumptively First Amendment protected materials are involved, RICO statutes like the Indiana law in this case will surely chill the production and distribution of a wide range of First Amendment protected materials.

In view of the foregoing, *amici* seek leave to file the attached brief.

Respectfully submitted,



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Distributors Association, Inc.

Dated: October 30, 1987

No. 87-470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

vs.

STATE OF INDIANA, *et al.*,

Respondents.

BRIEF ON BEHALF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AND INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Statement

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, and the International Periodical Distributors Association, Inc., (collectively referred to as *amici*) submit this joint brief, *amici curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of the petitioner, Fort Wayne Books, Inc., having submitted a motion for permission to file same.

Interest of the *Amici* and Summary of Argument

The interest of the *amici* reflects their continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on materials with sexual content. *Amici*'s brief will demonstrate how the legal principles involved in this case impact upon those who produce, distribute and sell material which is not obscene.

Although the case *sub judice* involves "adult" bookstores, the RICO statute upheld by the Indiana Supreme Court, and similar RICO statutes in other jurisdictions, are by no means limited to businesses which deal primarily in sexually explicit materials. In fact the padlocking of stores and massive seizure of printed materials involved in the two cases decided below did not distinguish between obscene and First Amendment protected materials. Everything was seized. The statute is drawn so broadly that it permits the massive seizure and forfeiture of assets, including non-obscene books and periodicals, from a business that does not carry a single obscene title but is shown only to have violated provisions relating to materials deemed "harmful to minors." Such a harsh possible result obviously chills the exercise of First Amendment rights by the legitimate booksellers, distributors and publishers who are the members of *amici*.

This concern of legitimate businesses is not unwarranted. There has been rising agitation directed against booksellers, publishers and distributors handling First Amendment protected materials. *Amici* cite but a few troubling recent examples. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but which were adjudged to be protected by the First Amendment. See *Council for Periodical Distributors Association v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd* 11th Cir. Nos. 86-7569, 86-7754 (Sept. 17, 1987). At the national level, the Attorney General's Commission on Pornography ("Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order

requiring the retraction of the charge and advice to the recipients that earlier communications from the Commisssion were of no legal effect and to be ignored. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986). In its subsequent July 1986 report, the Commission not only endorsed broad new law enforcement initiatives, but also encouraged "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment.

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides an effective means to substantially eliminate obscenity businesses." Attorney General's Commission on Pornography, *Final Report* at 435, 498 (July 1986). Although the Commission did not say so, RICO also provides an effective means to eliminate legitimate businesses which may have inadvertently crossed the gray line between what is obscene and what is not, as well as an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which may not meet with the approval of a faction in the community.

Amici contend that the Indiana RICO statute and similar statutes violate the First Amendment in that they constitute an unconstitutional prior restraint on First Amendment protected materials under the doctrine first defined in *Near v. Minnesota*, 283 U.S. 697 (1931), and, further, the statutes do not include the special protections that the Court has consistently imposed with respect to the seizure of presumptively First Amendment protected material.

The Challenged Statute

The Indiana RICO statute was enacted in 1980, and is similar to the federal RICO statute, 18 U.S.C. § 1961 *et seq*. Basically, the statute provides that anyone who acquires, maintains, or participates in any business through a "pattern of racketeering activity" is guilty of "corrupt business influence," a Class C felony.

Ind. Code § 35-45-6-2. A pattern of racketeering activity is in turn defined as commission in the course of five years of two related offenses from a list of specified offenses. Ind. Code § 35-45-6-1. As interpreted by the Indiana Supreme Court, conviction for the offenses is not required. *4447 Corporation v. Goldsmith*, 504 N.E.2d 559, 566 (Ind. 1987). The list of offenses includes all Indiana obscenity law crimes. These crimes include not only importation or sale of obscene matter (Ind. Code § 35-49-3-1), but also disseminating to minors matter harmful to minors, displaying matter harmful to minors in an area to which minors have visual, auditory or physical access, or displaying for sale matter harmful to minors within 500 feet of a church or school. (Ind. Code § 35-49-3-3). In addition to the criminal penalty, the State may invoke the full panoply of civil sanctions contained in Indiana Code Sections 34-4-30.5-1 through 30.5-4.

The civil remedies available for a violation of the Indiana RICO law are severe. They include forfeiture of any property derived from or used in the course of the RICO violation. Ind. Code § 34-4-30.5-3. Property may even be seized for forfeiture, and placed under seal or removed, by an officer on *ex parte* court order up to 180 days prior to the filing of any formal adversary forfeiture action. Ind. Code § 34-4-30.5-4. In this case, the entire contents of three bookstores were seized, without even an *ex parte* review of most of the material, which included First Amendment protected materials. In fact, the Indiana Supreme Court stated it to be "irrelevant" whether the assets seized and forfeited were obscene or not. 504 N.E.2d at 564. In addition, the Court may, on the bringing of an action to enjoin a violation, issue an injunction "prohibiting a defendant from engaging in the same type of endeavour as the enterprise in which he was engaged in violation of" the RICO law. Ind. Code § 34-4-30.5-2.

An injunction will be granted on a showing by a preponderance of the evidence that a RICO violation has occurred. Similarly, property may be civilly forfeited on a showing by a preponderance of the evidence that the property was derived from or used in the course of a RICO violation. Thus,

massive forfeitures of property and injunctions against engaging in similar businesses in the future may be effected even without any criminal conviction on the triggering violations, which, of course, would require proof beyond a reasonable doubt. As described by the Indiana intermediate appellate court, the RICO statute permits "seizure orders of indefinite duration and create[s] a remedy of permanent forfeiture which would extend to protected materials and neutral instrumentalities." *4447 Corporation v. Goldsmith*, 479 N.E.2d 578, 590 n. 8 (Ind. Ct. App. 1985).

REASONS FOR GRANTING THE WRIT

THE INDIANA RICO STATUTE CONSTITUTES AN UNCONSTITUTIONAL PRIOR RESTRAINT WHEN APPLIED BASED ON PREDICATE OFFENSES RELATING TO PRESUMPTIVELY FIRST AMENDMENT PROTECTED MATERIAL. IN LIGHT OF THE NUMBER OF JURISDICTIONS WITH SIMILARLY UNCONSTITUTIONAL PROVISIONS, THE ISSUE SHOULD BE RESOLVED BY THE COURT

The Indiana RICO statute provides for pre-judgment seizure and subsequent forfeiture of "any property used in the course of, intended for use in the course of, derived from, or realized through" a RICO violation. Ind. Code §§ 34-4-30.5-3 and 30.5-4. The overwhelming majority of books in a typical bookstore are not obscene, and most could not be deemed harmful to minors. Nevertheless, if over a five year period a store twice sold books judged by a particular community to be obscene, or sold to two minors books deemed harmful to those minors, or even, under the Indiana law, merely displayed two books harmful to minors in an area accessible to minors, the entire inventory of the store and all of its assets would be subject to forfeiture.[1] The store

[1] It may, in fact, subject the assets of an entire chain of stores to seizure and forfeiture. In a recent federal RICO indictment brought in the Eastern District of Virginia, forfeiture of a chain of video stores was sought. *United States v. Pryba*, No. CR 87-00208-A.

would thus be prevented from distributing the protected materials which at all times constituted the vast majority of its business. The intent and obvious effect of this forfeiture provision (as demonstrated by its enforcement in this case and its companion cases below) is to cause a forfeiture of the entire business enterprise through which the violation was committed, and thereby prevent the individuals involved from continuing in the same general line of business. Ind. Code § 34-4-30.5-2 (2) lends further support to this construction, since it expressly authorizes a court to issue an injunction prohibiting a defendant from engaging in a similar business. Where the predicate offense relates to sexually explicit materials and when the business is a bookstore, chain of stores, distributor of written materials, or publisher, this clearly constitutes a prior restraint violative of the First Amendment. The Court has clearly stated that "[a]ny system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc. v. Sullivan*, 372 U.S., at 70; *New York Times Co. v. United States*, 403 U. S., at 714; *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne*, 393 U. S. 175, 181 (1968); *Near v. Minnesota ex rel. Olson*, 283 U.S., at 716. The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. See *Speiser v. Randall*, 357 U.S. 513 (1958)." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-559 (1975) (quoted with approval in *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n. 13 (1980)).

The prior restraint imposed in this case and generally permitted under the Indiana and other similar RICO statutes is virtually identical to that struck down by the Court over 50 years ago in *Near v. Minnesota*, 283 U.S. 697 (1931). The statute in

Near authorized enjoining a person who published an obscene or defamatory periodical from further publication of the periodical.

Consistently since *Near* it has been clear that one cannot be punished for speech by the prohibition of future speech. See, *e.g.*, *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463 (6th Cir.), *cert. denied*, 107 S. Ct. 316 (1986); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980). Nor does the fact that the conduct is labeled "racketeering" strip away the protection of the First Amendment any more than labelling speech or speakers as "Nazi" (*Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied* 439 U.S. 916 (1978)); "Communist" (*De Jonge v. Oregon*, 299 U.S. 353 (1936)); anti-semitic (*Near v. Minnesota, supra*); or "subordinators of women" (*Hudnut v. American Booksellers Association*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986)) does so.

Books and periodicals are not the equivalent of drugs and gambling. For one thing, the former are presumptively First Amendment protected. For another, a drug can objectively be determined to be such. Whether a book is obscene, on the other hand, involves subjective determinations. Thus, the problem for *amici's* bookseller, distributor and publisher members is compounded by the difficulty of applying the *Miller* standard from community to community: As the Court has said, "The line between speech unconditionally guaranteed and speech which may be legitimately regulated, suppressed or punished is finely drawn." *Speiser v. Randall*, 357 U.S. 513, 525 (1959). "[C]onstitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." *Bantam Books v. Sullivan*, 378 U.S. 58, 66 (1963). The line becomes even dimmer and less certain when the "harmful to minors" standard of *Ginsberg v. New York*, 390 U.S. 629 (1968), is at issue, since such material by definition is First Amendment protected and has serious literary, artistic, political, or scientific value.

Finally, in calculating the chill which this statute must cast on legitimate booksellers, distributors, and publishers, the harsh

and heavy-handed seizure and forfeiture penalties are relevent. Booksellers, distributors and publishers can ill afford to lose everything because of errors of judgment as to what one community may deem "obscene" or "harmful to minors." To avoid this death penalty on their businesses, cautious businessmen are likely to avoid any works which may be considered by anyone to be obscene, harmful to minors, or simply controversial.

The First Amendment's purpose, however, was to encourage and foster open expression of all views, including those which may be unpopular or opposed by a segment of a community. To carry out this aim, the prior restraints and draconian penalties authorized here must fall before the First Amendment.[2]

The Indiana RICO statute is also unconstitutional and should also be invalidated for failure to comply with the Court's prior rulings imposing procedural safeguards on the seizure of presumptively First Amendment protected materials.

Under the statute, property may be seized for forfeiture up to 180 days before any forfeiture action is even commenced. Ind. Code § 34-4-30.5-4. Furthermore, when the forfeiture proceeding is eventually filed, the statute imposes no fixed time limit for judicial resolution of the action, and does not even urge that resolution be prompt. This open-ended period of seizure, based on a mere probable cause showing, violates the requirement that "any restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Freedman v. Maryland*, 380 U.S. 51, 59 (1965). See also *Vance v. Universal Amusement Co., supra*. Because the statute contains no guidelines requiring a prompt

[2] The provisions authorizing enjoining a defendant from continuing to engage in his line of business (Ind. Code § 34-4-30.5-2(2)) or ordering him to divest himself of his interest in a business (Ind. Code § 34-4-30.5-2(1)) are, for the same reasons, violative of the First Amendment when applied to creators or disseminators of protected speech.

judicial determination,[3] it may not constitutionally be employed to seize presumptively protected speech for forfeiture based on alleged obscenity law violations.

[3] In fact, in this case bookstores were padlocked, all of the books, shelves, cash registers, etc., contained in the stores were seized, and no trial was ever held.

CONCLUSION

The efforts of *amici's* members to promote the free exchange of ideas envisioned by the First Amendment requires a climate unhindered by fear of massive seizures and forfeitures of assets and inventories. The Court has consistently protected this climate by prohibiting prior restraints and strictly regulating permissible seizures. A prior restraint in the guise of a criminal racketeering law is, nonetheless, a prior restraint. Books and periodicals are not the equivalent of drugs and gambling. The First Amendment and the decisions of the Court have consistently given protected speech preferred status.

For the reasons set forth above, we respectfully urge this Court to grant a writ of certiorari to, and reverse the order of, the Supreme Court of Indiana.

Dated: October 30, 1987

Respectfully submitted,

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Supreme Court, U.S.
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No. 87-470

In The
Supreme Court of the United States
October Term, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF OF BURKE MENDENHALL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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No. 87-470

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—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

—o—

BRIEF OF BURKE MENDENHALL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

—o—

Burke H. Mendenhall submits this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of the petitioner in No. 87-470, having obtained the written consent of both the petitioner and the respondent to file same.

—o—

INTRODUCTION

Solely by virtue of his status as landlord to an adult bookstore, *Amicus* Burke H. Mendenhall became a defendant in the parallel Indianapolis civil RICO action, *Goldsmith v. 4447 Corporation,* consolidated with the present case in both of the Indiana appellate courts below. His original tenant, Burton Gorelick d/b/a Plaza Entertainment Center, a co-defendant, has long since vacated the premises which had been padlocked pursuant to the Indiana RICO/CRRA statutes[1] prior to the bookstore's ever opening for business. Yet today, more than four years after this litigation commenced, Mendenhall's property remains physically padlocked under the original 1983 court-ordered seizure and he has been unable to obtain a trial of the charges against him. Despite Mendenhall's repeated attempts to establish his nonliability under the RICO/CRRA statutes, the Marion County prosecutor reimposed this draconian padlocking restraint after Mendenhall relet the premises to a successor tenant, a completely unrelated video store against which no RICO, obscenity, or any other complaint has ever been lodged.

Initially, Mendenhall, an Indianapolis businessman and real estate developer, constructed a small shopping plaza located at 4266 West 38th Street, adjacent to the much larger Lafayette Square shopping center in a commercial district of suburban Indianapolis. The 7,000-square-foot plaza, of which the property at issue here

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[1] The Civil Remedies for Racketeering Activity (CRRA) statute, I.C. 34-4-30.5-1, *et seq.,* creates a civil RICO cause of action entailing injunctive and forfeiture remedies. The relevant provisions of the Indiana Code cited herein are reproduced in Appendix F to the Petition for Writ of Certiorari.

comprised some 5,000 square feet, was completed and originally made available for lease in 1974. Through a real estate broker, Mendenhall later entered into a normal commercial lease with Burton Gorelick, leasing him the large retail storeroom in which Gorelick intended to operate the Plaza Entertainment Center, an adult bookstore and video outlet. Gorelick took possession of the premises on June 1, 1983, and began preparations to open for business as an adult bookstore, obtaining the necessary zoning and use permits and complying with all other legal requirements prior to the scheduled opening date of August 1, 1983.

Just before the Plaza Entertainment Center was to open for business, Marion County Prosecutor Stephen Goldsmith initiated the civil RICO action which was consolidated on appeal with the present case. In his complaint filed August 1, 1983, Goldsmith alleged the existence of an "illegal enterprise" in violation of the Indiana RICO statute, I.C. 35-45-6-1 *et seq.,* consisting of the Plaza Entertainment Center and two other operating adult video and book stores allegedly under the common ownership and control of Burton Gorelick. Along with the corporate defendants and the individual owners, operators and employees of the adult bookstores, Mendenhall and the landlords of one of the two operating adult bookstores were also named as defendants.

Even though there were no prior obscenity convictions related to the operation of any of these bookstores, and indeed the Plaza Entertainment Center *had never even opened its door to the public,* Goldsmith sought to padlock the Plaza Entertainment Center and ultimately to

obtain the forfeiture of the other two bookstores. The complaint invoked the entire panoply of injunctive and forfeiture remedies against all of those allegedly associated with this "illegal enterprise," the purpose of which was "to operate . . . adult bookstores." To establish probable cause, the complaint relied upon an affidavit relating that Indianapolis police detectives had visited the two operating adult bookstores, where they discovered sexually explicit magazines, films and videotapes, and purchased four of the films. The police affidavit also recited that detectives visited the unopened Plaza Entertainment Center, where construction workers informed them that sexually-oriented materials would be available for sale when the store opened. This affidavit and the films were adduced to establish probable cause to believe that the alleged "enterprise" had twice violated Indiana obscenity laws, as predicate offenses subjecting the defendants to RICO liability under I.C. 35-45-6-2 and the related Civil Remedies for Racketeering Activity (CRRA) statute, I.C. 34-4-30.5-1 *et seq.*

Filed with Goldsmith's complaint, the Petition for Seizure of Property Subject to Forfeiture alleged that the defendants intended to open the Plaza Entertainment Center in furtherance of their "racketeering activity," *i.e.*, "dissemination of obscene material." The petition asserted that the new, unopened bookstore could be padlocked because it was under common ownership and control along with the other two bookstores. The petition further alleged in conclusory fashion that the new bookstore would probably distribute obscene materials in the future. This latter assertion was completely unsupported by the probable cause affidavit, which neither specified nor described any of the Plaza Entertainment Center's wares, and could hardly have alleged any obscenity violations on the part of this unopened bookstore which had yet to distribute the first book, film, or magazine.

Following *ex parte* proceedings held the same day the complaint and petition were filed (August 1, 1983), the Marion Circuit Court immediately ordered the seizure of Mendenhall's property, and the Plaza Entertainment Center was padlocked by the Indianapolis police. The trial court found probable cause to believe that the two existing bookstores were in violation of the RICO Act and therefore concluded the property leased by the third bookstore, *i.e.*, Plaza Entertainment Center, was also subject to forfeiture. While the seizure order allowed the other two bookstores to remain open, the Plaza Entertainment Center remained sealed until the Indiana Court of Appeals stayed this order on February 2, 1984, some six months later.

The tenant defendants filed motions to dismiss the complaint and to strike the *ex parte* seizure order on August 4, 1983, challenging the lack of procedural safeguards in the statutory scheme and more fundamentally noting that the Indiana RICO-CRRA statutes as applied to sanction alleged obscenity constituted an unlawful prior restraint in violation of the First and Fourteenth Amendments, under the rule of *Near v. Minnesota*, 283 U.S. 697 (1931). Following transfer of venue to the Hamilton Circuit Court, the tenant defendants again asserted substantive and procedural First Amendment violations in their September 12, 1983 Motion to Vacate the Order of August

1. The trial court denied these motions on November 21, 1983.

Immediately thereafter, on December 1, 1983, Mendenhall filed his own motion to dismiss, on grounds that the complaint was legally insufficient to establish any liability on his part under the RICO/CRRA statutes. As to Mendenhall, the amended complaint of September 8, 1983, stated only that he owned the real property leased to Plaza Entertainment Center. Implicitly, the complaint alleged that simply by his leasing of retail premises for operation of the Plaza Entertainment Center, Mendenhall had participated in and associated with the allegedly criminal "Gorelick Enterprise," rendering his property subject to forfeiture.

For over six months, the trial court failed even to set for hearing Mendenhall's motion to dismiss asserting that his arms-length landlord-tenant relationship with Gorelick hardly sufficed to establish participation in any "criminal enterprise." Only after Mendenhall had petitioned the Indiana Supreme Court to withdraw the cause from the trial judge was the matter set for hearing; the trial court finally denied the motion without explanation on August 15, 1984.

Two weeks after the summary denial of his motion to dismiss, on August 29, 1984, Mendenhall filed a motion for a separate trial, again asserting the lack of a legal and

factual basis for the action against him. This motion too was summarily denied on September 24, 1984.[2]

Meanwhile, the corporate defendants and Burton Gorelick pursued an interlocutory appeal, challenging the Indiana RICO/CRRA statutes on First and Fourteenth Amendments grounds. Mendenhall did not join in this appeal,[3] which effectively stayed proceedings in the trial court. On February 25, 1985, the Court of Appeals formally ordered a stay of the trial court proceedings pending its resolution of the constitutional issues.[4] Pending the very protracted appellate litigation in the Indiana Court of Appeals and then the Indiana Supreme Court, therefore, Mendenhall was unable to obtain any trial court adjudication of his nonliability under the RICO Act.

The Indiana Court of Appeals subsequently held the challenged statutes facially invalid as applied to the predicate offense of obscenity, only to be reversed by the Indiana Supreme Court. The Indiana Supreme Court's

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2 Somewhat inexplicably, on December 27, 1984, the plaintiff stipulated to dismissal as to the other landlord-defendants, Disk Development, Ivan Chalfie, and Henry Kahn, but not as to Mendenhall. Except for the legal pressure brought to bear upon Mendenhall by adjoining landowners, who then operated the largest shopping mall in Indiana adjacent to Mendenhall's premises, the situation of all the landlord-defendants was materially identical.

3 Thus Mendenhall, although a defendant in one of the consolidated cases from which this petition arises, did not raise these federal questions in the Indiana appellate courts, and has no standing directly to raise the issues before this Court as a petitioner for a writ of certiorari. *See, Puget Sound Power & Light Co. v. King County*, 264 U.S. 22 (1924).

4 The appeal by the co-defendants therefore prevented Mendenhall from obtaining a trial because his motion to dismiss had been denied as was his motion for a separate trial.

decision of March 2, 1987, upheld not only the statutory sanctions of padlocking and seizure of inventory and fixtures, but also finally concluded as a matter of state law that the entire statutory scheme (necessarily including its ultimate sanction of forfeiture) is immune from First Amendment challenge. (See petitioner's appendix at 8-15.) Accordingly, there has been a decision by the state court of last resort that the statutes' post-trial forfeiture remedies do not violate the First Amendment.

While the state appeals were pending, tenants Burton Gorelick and Plaza Entertainment Center defaulted under the lease of Mendenhall's property, and the store has since been relet to the Video and Gift Center, Inc., which took possession of the property on August 1, 1987. However, in light of the Indiana Supreme Court's decision, Prosecuting Attorney Goldsmith wasted no time in padlocking the business premises of this new, completely unrelated tenant. Asserting his authority to do so under the original *ex parte* order of the Marion Circuit Court, Goldsmith has padlocked another communicative establishment, even though this one is in no way implicated in the ongoing RICO litigation. Video and Gift Center, Inc. has initiated a civil complaint against Goldsmith and the City of Indianapolis in the Marion County Superior Court, Cause No. S487-1277, filed October 14, 1987, asserting the lack of lawful authority for this restraint. Video and Gift Center's application for temporary restraining order is currently set for hearing on November 9, 1987.

Mendenhall, meanwhile, petitioned the Indiana Supreme Court for a stay of the padlocking order, pending

disposition of this petition for certiorari. This application for stay was denied on September 2, 1987. (A copy of the order denying that stay appears in Appendix B to the petition for writ of certiorari.)

As *amicus*, then, Mendenhall's interest in this litigation is both direct and symbolic. The release of his rental property from court-ordered seizure turns on the resolution of the issues presented by the petition. From a broader perspective, however, he represents the dilemma these pre-trial seizure and ultimate forfeiture provisions pose for any property owner who would lease premises to a communicative enterprise. As a landlord who desires to continue renting retail space to unrelated video stores or bookstores, this *amicus* has been directly affected by the over-reaching sanctions of the RICO/CRRA statutes, which cast a chilling pall over the operation of such communicative businesses and patently threaten the free circulation of protected First Amendment materials.

INTEREST OF AMICUS

Amicus Mendenhall's experience in this civil RICO litigation illustrates from yet another perspective the deeply-flawed nature of the RICO statutory scheme as a response to obscenity. His role exclusively as arms-length landlord to a communicative enterprise, an adult video and book store, has resulted in two separate instances of the physical seizure of his property, the latest involving the padlocking of a new tenant's First Amendment business long after the tenant alleged to be part of the "il-

legal enterprise" had disappeared from the scene. Despite this landlord's repeated and vigorous attempts to litigate his nonliability under the RICO/CRRA statutes by means of motions to dismiss and for a separate trial, title to his property has remained under the cloud of court-ordered seizure for over four years with no opportunity for a trial.

Pursuant to the RICO/CRRA statutes, Mendenhall has patently been denied the most basic guarantees of procedural and substantive due process. Of course, these issues have not been addressed by the appellate courts of Indiana and are not before this Court, except insofar as they serve to underscore the abusive manner in which the RICO/CRRA statutes have been applied, and their far-reaching implications for protected First Amendment activity.

Nonetheless, as a landowner who wishes to continue leasing his premises to communicative businesses, Mendenhall necessarily shares petitioner's concern with the fundamental issue presented by this petition for certiorari: whether the seizure and forfeiture of entire bookstores and theaters as punishment solely for obscenity as unprotected speech contravenes the free-speech guarantees of the First Amendment. From Mendenhall's standpoint, these seizure and forfeiture remedies upheld by the Indiana Supreme Court not only threaten the direct imposition of unconstitutional prior restraints and impose a strict regimen of self-censorship on all communicative businesses; they also chill and deter innocent third parties, *i.e.* landlords, from leasing their property to bookstores, theaters, or video outlets that might sell *any* sexually oriented materials, no matter how tame or within

the bounds of community acceptance. Because a commercial landlord cannot make an item-by-item analysis of the entire book or videotape inventory of its tenant, the only commercially feasible response is to draft leases prohibiting the sale of *any* media materials which are even remotely sexually oriented.

—o—

ARGUMENT

In *Near v. Minnesota*, 283 U.S. 697 (1931), this Court held that it was the "*operation and effect*" of the statute under review which determined whether it would be subject to First Amendment scrutiny as a prior restraint. 283 U.S. at 708. (Emphasis added.)

In this case, the Indiana Supreme Court departed from this required analysis by simply looking at the presumed legislative *intent*. Concluding that the state's RICO laws were not *intended* as a prior restraint, the Court reasoned that it was unnecessary to examine the operation and effect of the statutes as applied to the predicate offense of alleged obscenity violations. Under a proper *Near* analysis, the Court would have instantly recognized that, as applied to punish exclusively expressive conduct, the RICO statute has an impermissible *effect*, *i.e.* it allows the state to completely restrain both present and future expression simply because two or more of thousands of different media items, all presumptively protected by the First Amendment, are found to be probably obscene. A holding more

fundamentally at odds with the prior restraint doctrine of *Near* could hardly be imagined.[5]

This Court's most recent treatment of this issue came last year in *Arcara v. Cloud Books, Inc., supra,* — U.S. —, 106 S.Ct. 3172 (1986). In *Arcara,* the majority held permissible the closing of a bookstore under a generally-applicable public health nuisance statute, solely on grounds that illicit sexual activity, including prostitution, took place on the premises. The Court emphasized that the statute was aimed at conduct which involved "absolutely no element of protected expression." 106 S.Ct. at 3177. Chief Justice Burger for the majority carefully distinguished as an unconstitutional prior restraint under *Near* any such closure of a bookstore "on the basis of an advance determination that the distribution of particular materials is prohibited." Fn. 2, *id.* In such a case, "where it was conduct with a significant expressive element that drew the legal remedy in the first place," the usual strict scrutiny under the prior restraint doctrine would apply.[6] *Id.* at 3177-78.

---

[5] Indeed, beyond its pretrial seizure and post-judgment forfeiture remedies, the RICO/CRRA statutory scheme goes so far as to authorize an injunction "prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged" in violating the RICO Act, so that a defendant could be precluded from future operation of any other presumptively-protected bookstore or theater. I.C. 34-4-30.5-2.

[6] To further underscore this point, Justice O'Connor, joined by Justice Stevens, concurred specifically to distinguish the closure in *Arcara* from an invalid prior restraint based on expressive conduct: "If . . . a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books . . . , the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Id.* at 3178.

Accordingly, this Court in *Arcara* unanimously makes clear that *Near's* requirement that the *operation and effect* of the statute must be examined remains in full force and effect where, as here, the statutory sanctions turn on a finding of prior unlawful expressive activity. Since the Indiana Supreme Court failed to follow this clear requirement, its extremely dangerous holding must be reversed.

Because of its fundamentally-flawed analysis regarding the applicability of First Amendment principles, the Indiana Supreme Court likewise ignores the extreme *chilling effect* of these statutes upon almost all commercial First Amendment activity. This Court has repeatedly emphasized that sanctions for the dissemination of obscene materials must not sweep so broadly as to curtail the availability of nonobscene literature and films due to self-censorship on the part of their distributors and exhibitors. *See, e.g., Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963); *Smith v. California,* 361 U.S. 147 (1959). Yet the very existence of these lethal RICO sanctions of pretrial seizure and outright forfeiture, as upheld by the Indiana Court, will unquestionably cause First Amendment businesses and those who deal with them to steer far clear of the "dim and uncertain line" separating obscenity from constitutionally protected expression. *Bantam Books, supra,* 372 U.S. at 66.

As pointed out in the Interest of Amicus, *supra,* unless review is granted by this Court, the chilling effect of the statute will be felt not only by those who actually sell or exhibit media materials, but also by those, including landlords, who deal commercially with such entities. The severe deterrent effect upon landlords will be two-fold: First, they will always have to fear the possibility that a

successful RICO action brought against their tenant could result in the permanent forfeiture of their real estate. Second, even if the statute is construed to prohibit permanent forfeiture of the landlord's real estate, the landlord must nonetheless fear the loss of the value of his property during the potentially lengthy period of time while the pretrial restraints remain in effect. In the present case, the seizure order has been in effect for four years and the landlord has not yet had an opportunity to defend against these charges at trial.

Accordingly, it may be fairly concluded that if the Indiana Court's decision is allowed to stand, landlords will be extremely reluctant to rent their premises to those engaged in expressive activities. Moreover, those landlords that do rent their premises to such entities will inevitably be cast in the role of censor. Because, as mentioned above, landlords cannot practically examine the inventory of tenants engaged in communicative expression, the only way a landlord who rents to a book or video store can protect his or her interest is to impose lease restrictions which prohibit the sale or exhibition of *any* sexually-oriented materials, regardless of whether the tenant reasonably believes them to be entitled to First Amendment protection. As a result, if this Court declines review, the *chilling effect* which flows from these statutes will pose even more wide-ranging threats to the rights of the public to receive First Amendment materials than the more dramatic direct restraints of padlocking and forfeiture.[7]

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[7] The dilemma of the landlord facing the imposition of a prior restraint upon a theater tenant is illustrated by *Vance v.*

(Continued on following page)

In the last analysis, *amicus'* personal stake in this litigation, although substantial, is dwarfed by the importance of these issues as a matter of core First Amendment doctrine. As the Indiana Court of Appeals observed in its scholarly and insightful opinion in this cause, "the guarantees of the First Amendment mean nothing if the state may arrogate such discretion over the continued existence of bookstores and theaters." *4447 Corporation v. Goldsmith*, 479 N.E.2d 578, 601 (Ind.App. 1985).

—o—

CONCLUSION

For the reasons set forth above, Burke H. Mendenhall as *amicus curiae* respectfully urges this Court to grant the petition for writ of certiorari in this case.

DATED: October 30, 1987

Respectfully submitted,

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(Continued from previous page)

Universal Amusement Co., Inc., 455 U.S. 308 (1980). After the county attorney informed the landlord he intended to enjoin operation of the theater as a public nuisance, the landlord notified the theater its lease would be terminated. In *Vance*, of course, this Court upheld the Fifth Circuit's invalidation of an injunction against future exhibition of unnamed motion pictures.

(6) (3)

NOS. 87-470 AND 87-614

Supreme Court, U.S.
FILED
MAY 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

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No. 87-470

FORT WAYNE BOOKS, INC.,

Petitioner,

vs.

STATE OF INDIANA, *et al.*,

Respondents.

No. 87-614

RONALD W. SAPPENFIELD, *et al.*,

Petitioners,

vs.

STATE OF INDIANA,

Respondent.

o

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA AND THE INDIANA COURT OF APPEALS

o

JOINT APPENDIX

o

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Petition for Certiorari in No. 87-470 Filed Sept.16, 1987
Certiorari in No. 87-470 Granted March 7, 1988
Petition for Certiorari in No. 87-614 Filed Oct. 14, 1987
Certiorari in No. 87-614 Granted March 7, 1988

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STATE OF INDIANA, et al. v. FORT WAYNE BOOKS, et al.

RELEVANT DOCKET ENTRIES

Date of Filing	ALLEN CIRCUIT COURT
3/19/84	Comes now Plaintiff, by counsel and files Complaint for Injunctive Relief From Corrupt Business Influence And Action For Forfeiture Of Property Incident To Corrupt Business Influence And Verified Petition For Seizure Of Property Subject To Forfeiture And Probable Cause Affidavit.
3/19/84	State of Indiana and its Prosecuting Attorney for the 38th judicial circuit submit evidence. Probable cause found. Order issued for seizure and forfeiture.
3/23/84	Come now defendants, Fort Wayne Books, Cinema Blue & Erotica House Bookstore and file a Motion To Vacate And/Or Modify Order which is now set for hearing on March 29, 1984.
3/27/84	Come now defendants, by counsel, and file Motion For Protective Order. The Court hereby approves the same.
3/27/84	Comes now defendant, by counsel, and files Supplemental Motion to Dismiss Order of Court entered March 19, 1984 and Memorandum of Law Re: Court Order.
3/29/84	Plaintiffs file Response To Defendants' Motion To Vacate Or To Modify Court Order Entered And Filed On March 19, 1984 and Defendants' Supplemental Motions To Dismiss. Defendants' motions to vacate or modify and to dismiss are denied. Defendants file Motion to Stay Pending Appeal. Denied without preju-

dice to reapply if proper application for Interlocutory Appeal is made and perfected.

4/3/84 Defendants, Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc., by counsel, file praecipe for transcript of entire record, emergency motion for inventory of property removed and/or return of property, petition to certify issues and grounds to the Indiana Court of Appeals upon interlocutory order of March 19, 1984, . . . and motion for stay pending appeal.

4/4/84 Plaintiff files Answers To Emergency Motion For Inventory Of Property Removed And/Or Return Of Property. Motion For Inventory is moot as having been provided and [motion] for return of property is in all respects denied.

4/12/84 Defendants, Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc., by counsel file: Assignment of Error; Supplemental and Consolidated Petition to Certify Issues and Grounds to the Indiana Court of Appeals Upon Interlocutory Order of March 19, 1984 under Indiana Rules of Appellate Procedure Rule 4(B)(6); and Motion for Stay [Pending] Appeal.

4/17/84 Plaintiff, by counsel files: Response to "Supplemental and Consolidated Petition to Certify Issues and Grounds to the Indiana Court of Appeals . . ."; Response to Defendants' Motions for Stay Pending Appeal; and Lis Pendens Notice.

4/18/84 Court DENIES in their entirety Defendants', Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., Erotica House Bookstore, Inc.; (1) Motion for Stay Pending Appeal filed 4/3/84; (2) the Assignment of Error and (3) Motion for Stay Pending Appeal filed 4/12/84;

grants . . . the Petition to Certify filed 4/3/84 and the Supplemental Petition to Certify filed 4/12/84 . . . . The Court files its written order of certification pursuant to request and App. Rule 4(B)(6). The Court further finds that the parties have proceeded diligently in respect to prosecution of this cause for consideration as an appealable interlocutory order. Praecipe for Transcript of Entire Record is filed.

6/26/84 Notice received from Court of Appeals. Extension of time to file record of proceedings, granted to and including June 30, 1984.

4/8/85 Copy of Order from Indiana Court of Appeals [staying seizure of defendants' property] received and noted. Order of this Court dated March 19, 1984 modified to conform thereto.

5/12/85 Unofficial Opinion received and filed this date from the Court of Appeals of Indiana.

INDIANA COURT OF APPEALS

12/15/83 Motion for Stay (Modification) of Interlocutory Injunction without Bond Pending Appeal [in *4447 Corporation v. Goldsmith*]

1/3/84 Brief of Appellants [*4447 Corporation v. Goldsmith*]

1/18/84 Brief of Appellee [*4447 Corporation v. Goldsmith*]

2/2/84 It is therefore Ordered, Adjudged and Decreed by the Court that the Order heretofore entered by the Circuit Court of Marion County, The Honorable Anthony J. Metz, Judge Pro Tem presiding, in Cause No. C83-1788, dated August 1, 1983, is hereby modified pending appeal in the following respects:

A. That the Indianapolis Police Department shall forthwith unlock, unseal and release all

property within the commercial building at 4266 (erroneously designated 4276) West 38th St., Marion County, Indiana, which property had heretofore been locked, sealed and secured pursuant to the Order of the Marion County Circuit Court, filed August 1, 1983; and

B. Defendants shall preserve all property at 4266 West 38th Street, Marion County Indiana until further order of this Court; defendants shall not transfer or remove from said Building any fixtures, cabinets, cameras, audio or video equipment, cash registers or other property until further order of this Court. This paragraph shall not prevent defendants at 4266 West 38th Street, Marion County, Indiana, from transferring or selling books, magazines, newspapers or videotapes. However, until further order of this Court, all other property shall be held by the defendants.

4/18/84 Verified Petition to Certify Issues and Grounds to the Indiana Court of Appeals upon Interlocutory Order of March 19, 1984 [*Fort Wayne Books v. Sims*]

4/27/84 Motion for Stay (Modification) of Interlocutory Injunction without Bond Pending Appeal [in *Fort Wayne Books v. Sims*]

5/2/84 ORDER OF CONSOLIDATION: IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Cause No. 3-484A106 as hereinabove captioned be and the same hereby is consolidated with Cause No. 4-1283A415 as hereinabove captioned for a determination of the common question of law therein presented. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said causes of action

hereinabove consolidated be and the same hereby are consolidated under Cause No. 4-1283A415.

[6/84] [Brief of Appellants, Fort Wayne Books, Inc., et al.]

7/23/84 Brief of Appellees State of Indiana and Stephen Sims

9/25/84 Request for Expeditious Ruling on Motion for Stay (Modification) [in *Fort Wayne Books v. Sims*]

10/10/84 State's Response to Request for Expeditious Ruling on Motion for Stay

4/ 4/85 *ORDER*: IT IS THEREFORE ORDERED that the Order heretofore entered by the Allen Circuit Court, the Honorable Thomas L. Ryan, Judge, presiding, in Cause Number CC84-446 of said Court, dated March 19, 1984, is hereby modified, and ordered to conform with the stay heretofore made and entered in the *4447 Corporation* case, pending the further order of this Court. A written opinion on the merits of the appeal will imminently follow this order.

6/12/85 [Opinion of Court of Appeals]

INDIANA SUPREME COURT

5/ 2/84 Appellees' Verified Petition for Transfer of [Consolidated] Case to the Supreme Court of Indiana

7/17/84 ORDER: This Court being duly advised in the premises now DENIES the "Appellees' Verified Petition(s) for Transfer of Case(s) to the Supreme Court of Indiana. The consolidated cases are remanded to the Indiana Court of Appeals for consideration and decision. Additionally, appellants' "Motion for Stay (Modification) of Interlocutory Injunction Without Bond Pending Appeal" under cause no. 3-484 A 106 is also

remanded to the Court of Appeals for disposition.

8/ 8/85 Appellees' Petition to Transfer [following decision of Court of Appeals]

8/23/85 Appellants' Memorandum in Opposition to Appellee's Petition to Transfer

3/26/86 [Appellants'] Supplemental Citations to Authorities Mentioned in Argument

7/16/86 State's Submission of Supplemental Authority

9/ 9/86 Response to Appellees' Submission of Supplemental Authority; Appellants' Memorandum Re Significance of *Arcara v. Cloud Books, Inc.*

1/20/87 Appellees' Additional Authority

3/ 2/87 Appellee's "Petition to Transfer" is hereby GRANTED, with opinion.

3/21/87 Appellants' Petition for Rehearing

6/18/87 "Appellants' Petition for Rehearing" is hereby denied.

8/19/87 Petition [of Burke H. Mendenhall] for Stay of Execution in Connection with Petition for Certiorari

9/ 2/87 ORDER: This Court now denies the "Petition for Stay of Execution in Connection with Petition for Certiorari," as this Court is without jurisdiction over this matter.

3/ 7/88 United States Supreme Court Issued the Enclosed Order: The Petition herein for a Writ of Certiorari to the Supreme Court of the State of Indiana is Granted.

IN THE ALLEN CIRCUIT COURT
CAUSE NO. CC-84-446

STATE OF INDIANA)
) ss
COUNTY OF ALLEN)

STATE OF INDIANA AND)
STEPHEN M. SIMS, PROSECUTING)
ATTORNEY FOR THIRTY-EIGHTH)
JUDICIAL CIRCUIT,)
Plaintiff,)
vs.)
)
FORT WAYNE BOOKS, INC.,)
CINEMA BLUE OF FORT WAYNE,)
INC., EROTICA HOUSE)
BOOKSTORE, INC., MR. DONALD)
KRONTZ; MR. DONALD KRONTZ)
IN HIS CAPACITY AS MANAGER)
OF FORT WAYNE BOOKS, INC.,)
MANAGER OF CINEMA BLUE OF)
FORT WAYNE, INC., MANAGER)
OF EROTICA HOUSE BOOK-)
STORE, INC.; MR. DONALD)
KRONTZ IN HIS CAPACITY AS A)
MEMBER OF THE BOARD OF)
THE BOARD OF DIRECTORS OF)
FORT WAYNE BOOKS, INC.,)
CINEMA BLUE OF FORT WAYNE,)
INC., EROTICA HOUSE BOOK-)
STORE, INC.; MARK A BROOKS,)
THE GROUP d/b/a/ EUROPEAN)
INVESTMENTS N V, THE GROUP)
d/b/a THEATRE A CORPORATION,)
NANCY S. JOHNSON,)
CYRUS B. COOPER,)
Defendants.)

COMPLAINT FOR INJUNCTIVE RELIEF FROM CORRUPT BUSINESS INFLUENCE AND ACTION FOR FORFEITURE OF PROPERTY INCIDENT TO CORRUPT BUSINESS INFLUENCE

Comes now Stephen M. Sims as Prosecuting Attorney for the Thirty-Eighth Judicial Circuit of the State of Indiana and brings this civil action for injunctive relief and forfeiture of property incident to corrupt business influence, pursuant to Indiana Code 34-4-30.5-2, 34-4-30.5-3, and alleges that said action is brought to enjoin a violation of Indiana Code 35-45-6-2 and violations of Indiana Code 35-30-10.1-2 and violations of Indiana Code 35-49-3-1 and in his capacity as Prosecuting Attorney of said Thirty-Eighth Judicial Circuit alleges as follows:

I.

That the defendant Fort Wayne Books, Inc. has since the 8th day of June, 1981, up to and including the date of the filing of this complaint:

a) offered to distribute, distributed, or exhibited to another person obscene matter; and

b) that said Fort Wayne Books, Inc. has during said period of time attempted to commit, or conspired to commit, or aided and abetted in a violation of Indiana Code 35-30-10-2 and Indiana Code 35-49-3-1 and Indiana Code 35-45-6-2; and

c) that Fort Wayne Books, Inc. has "associated in fact" with Cinema Blue of Fort Wayne, Inc., Erotica House Bookstores, Inc., Donald Krontz personally and as a manager and member of the board of directors of the aforesaid corporations, the other defendants named herein and individuals not known to your plaintiff, in at least two incidents of racketeering activity that have had the same or similar intent, result, accomplice, victim, or method of commission and that as a result of such actions the defendant Fort Wayne Books, Inc. has received proceeds directly or indirectly derived from a pattern of racketeering activity; and

d) that said corporation has used or invested those proceeds to acquire an interest in real property or to establish or to operate the enterprise; and

e) that through said pattern of activity said corporation has knowingly or intentionally acquired or maintained, either directly or indirectly, an interest in or control of real property or an enterprise; and

f) that said corporation has employed Donald Krontz and others not known to your plaintiff who have been employed and associated with the enterprise and who knowingly or intentionally, on a daily basis, conducted or otherwise participated in the activities of that enterprise through a pattern of "racketeering activity".

In support thereof your plaintiff further alleges as follows:

1. That Fort Wayne Books, Inc. is an Indiana Corporation which began its corporate existence on the 4th day of April, 1979, and which has continued in existence up to and including the date of the filing of this complaint.

2. That the Certificate of Incorporation of Fort Wayne Books, Inc. under Article IV establishes the name and address of the corporate resident agent for service of process as C T Corporation System and listed its address as 1011 Merchants Bank Building, Indianapolis, Indiana 46204, and that said Articles of Incorporation indicate that the principal office of said corporation and the post office address of the corporation is 1011 Merchants Bank Building, Indianapolis, Indiana 46204.

3. That said Fort Wayne Books, Inc. has from 1981 up to and including the date of the filing of this complaint operated its principal activities and acts at 227 West Pearl Street, Fort Wayne, Allen County, Indiana.

4. That on July 1, 1983 and, to the best of your petitioner's knowledge, up to the date of the filing of this complaint Donald Krontz was employed by Fort Wayne Books, Inc. as the manager of said corporation and was simultaneously employed by Cinema Blue of Fort Wayne, Inc. as the manager of that corporation and was employed by Erotica House Bookstore, Inc. as the manager of that corporation. That simultaneously Mr. Donald Krontz is and has been a member of the board of directors of all three of said corporations.

5. That on or about the 8th day of June, 1981, Fort Wayne Books, Inc. was also known as Main Street Swinger World Adult News and Peep Show and that it operated a store in Allen County, Indiana, at 227 Pearl Street, and that said corporation did on the 8th day of June, 1981 violate Indiana Code 35-30-10.1-2 in that its human agent, Allen H. Sedelbauer, did sell obscene materials to Officer Charles Dennis of the Fort Wayne Police Department and that said corporation was convicted by the Allen Superior Court in Cause No. CRM-81-10113 of two counts of violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

6. That on June 15, 1981 Allen H. Sedelbauer did knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2 to Charles Dennis, a Fort Wayne police officer. That said Allen H. Sedelbauer was convicted by the Allen Superior Court in Cause No. CRM-81-10114 of said violation. That at the time of said offense said Allen H. Sedelbauer was an agent of the corporation acting within his actual authority in the normal course of business at 227 Pearl Street, Fort Wayne, Indiana, for and on behalf of Fort Wayne Books, Inc.

7. That on the 11th day of February, 1982 Allen H. Sedelbauer did knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2 by selling said obscene matter to a Fort Wayne police officer. That Allen H. Sedelbauer was convicted by the Allen Superior Court in Cause No. CRM-82-2771 of said violation. That at the time of said offense Allen H. Sedelbauer was an agent of the corporation acting within his actual authority in the normal course of business at 227 Pearl Street, Fort Wayne, Indiana, for and on behalf of Fort Wayne Books, Inc.

8. That on or about the 10th day of June 1982 Fort Wayne Books, Inc. operated a store in Allen County, Indiana, at 227 Pearl Street, and that said corporation did on the 10th day of June, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, James D. Harp, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted by the Allen Superior Court in Cause No. CRM-82-14255 of said violation.

9. That on or about the 9th day of August, 1982 Fort Wayne Books, Inc. operated a store in Allen County, Indiana, at 227 Pearl Street, and that said corporation did on the 9th day of August, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Barry W. Dangler, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted by the Allen Superior Court in Cause No. CRM-82-14253 of said violation.

10. That on or about the 28th day of September, 1982 Fort Wayne Books, Inc. operated a store in Allen County,

Indiana, at 227 Pearl Street, and that said corporation did on the 28th day of September, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Daniel L. Morgan, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted by the Allen Superior Court in Cause No. CRM-82-22385 of said violation.

11. That on or about the 29th day of September, 1982 Fort Wayne Books, Inc. operated a store in Allen County, Indiana, at 227 Pearl Street, and that said corporation did on the 29th day of September, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Daniel L. Morgan, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted by the Allen Superior Court in Cause No. CRM-82-22386 of said violation.

12. That on or about the 1st day of December, 1982 Fort Wayne Books, Inc. operated a store in Allen County, Indiana, at 227 Pearl Street, and that said corporation did on the 1st day of December, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Anthony Leedy, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted by the Allen Superior Court in Cause No. CRM-82-22452 of said violation.

13. That on or about the 9th day of May 1983, Fort Wayne Books, Inc. did employ one Mark A. Brooks, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said corporation's business address, that is 227 Pearl Street, Fort Wayne,

Allen County, Indiana, did on the 9th day of May, 1983, at the County of Allen in the State of Indiana, then and there unlawfully and knowingly distribute obscene material for consideration in violation of Indiana Code 35-30-10.1-2 by selling a certain obscene publication, to-wit: a magazine entitled "Punk Dominatrix". That said defendant was convicted in the Allen Superior Court for "Distributing Obscene Matter for Consideration" in Count I of Cause No. CR-83-386.

14. That on or about the 13th day of May, 1983, Fort Wayne Books, Inc. did employ one Mark A. Brooks, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said corporation's business address, that is 227 Pearl Street, Fort Wayne, Allen County, Indiana, did on the 13th day of May, 1983, at the County of Allen and in the State of Indiana, then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Kinky Mistress". That said defendant was convicted in the Allen Superior Court of "Distributing Obscene Matter for Consideration" in Count II of Cause No. CR-83-386.

15. That on or about the 3rd day of June, 1983, Fort Wayne Books, Inc. did employ one Mark A. Brooks, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual

authority and in the normal course of business at said corporation's business address, that is 227 Pearl Street, Fort Wayne, Allen County, Indiana, did on the 3rd day of June 1983, at the County of Allen and in the State of Indiana, then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Breast Bondage". That said defendant was convicted in the Allen Superior Court of "Distributing Obscene Matter for Consideration" in Count III of Cause No. CR-83-386.

16. That on or about the 9th day of May, 1983, Fort Wayne Books, Inc. did employ one Daniel L. Morgan, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said corporation's business address, 227 Pearl Street, Fort Wayne, Allen County, Indiana, on the 9th day of May, 1983, at the County of Allen and in the State of Indiana, said Daniel L. Morgan did then and there violate Indiana Code 35-30-10.1-2 in that he unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Fantasy World". That said defendant was convicted in the Allen Superior Court of "Distributing Obscene Matter for Consideration" in Count I of Cause No. CR-83-384.

17. That on or about the 10th day of May, 1983, Fort Wayne Books, Inc. did employ one Daniel L. Morgan, who

was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said corporation's business address, 227 Pearl Street, Fort Wayne, Allen County, Indiana, on or about the 10th day of May, 1983, at the County of Allen and in the State of Indiana, said Daniel L. Morgan did then and there violate Indiana Code 35-30-10.1-2 in that he unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Kinky Mistress". That said defendant was convicted in the Allen Superior Court of "Distributing Obscene Matter for Consideration" in Count II of Cause No. CR-83-384.

18. That on or about the 7th day of June, 1983, Fort Wayne Books, Inc. did employ one Daniel L. Morgan, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said corporation's business address, 227 Pearl Street, Fort Wayne, Allen County, Indiana, on or about the 7th day of June, 1983, at the County of Allen, State of Indiana, said Daniel L. Morgan did then and there violate Indiana Code 35-30-10.1-2 in that he unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Hard". That said defendant was convicted in the

Allen Superior Court of "Distributing Obscene Matter for Consideration" in Count III of Cause No. CR-83-384.

19. That on or about the 29th day of November, 1983, and on the 1st day of December, 1983, Fort Wayne Books, Inc. did employ one Nancy S. Johnson who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within her actual authority and in the normal course of business at said corporation's business address, 227 Pearl Street, Fort Wayne, Allen County, Indiana, she did respectively, on or about the 29th day of November, 1983, and the 1st day of December, 1983, at the County of Allen, State of Indiana, then and there violate Indiana Code 35-49-3-1 in that she unlawfully and knowingly distributed obscene matter for consideration by selling (respectively) a certain obscene publication, to-wit: a magazine entitled "Rope Party" and a magazine entitled "Shackled". That said Nancy S. Johnson was convicted of two counts of "Distributing Obscene Matter for Consideration" in the Allen Superior Court in Cause No. CR-83-509.

20. That on or about the 21st day of November, 1983, and the 5th day of December, 1983, Fort Wayne Books, Inc. did employ one Mark A. Brooks who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said corporation's business address, 227 Pearl Street, Fort Wayne, Allen

County, Indiana, he did respectively on or about the 21st day of November, 1983, and the 5th day of December, 1983, at the County of Allen, State of Indiana, then and there violate Indiana Code 35-49-3-1 in that he unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling (respectively) a certain obscene publication, to-wit: a magazine entitled "Bondage" and a magazine entitled "Corporal". That said Mark A. Brooks was convicted of two counts of "Distributing Obscene Matter for Consideration" in Allen Superior Court Cause No. CR-83-513.

21. That Fort Wayne Books, Inc. and A Group d/b/a European Investments N V, in addition to the aforesaid acts, has on a daily basis from the 8th day of June, 1981 up to and including the date of the filing of this complaint used the real estate commonly known as 227 Pearl Street, Fort Wayne, Allen County, Indiana, as a place to offer to distribute, distribute, and exhibit to other persons obscene matter.

22. That Fort Wayne Books, Inc. and A Group d/b/a European Investments N V, in addition to the aforesaid acts, has on a daily basis from the 8th day of June, 1981 up to and including the date of the filing of this complaint:

a) used the real estate commonly known as 227 Pearl Street, Fort Wayne, Allen County, Indiana, as a place to gather for distribution, display, and offer to other persons for consideration similar obscene matter and have continued to commit, or attempt to commit, or conspire to commit, or to aid and abet in the violation of Indiana Code 35-45-6-2 and Indiana Code 35-30-10. 1-2 or 35-49-3-1;

b) that title to said real property commonly known as 227 Pearl Street, Fort Wayne, Indiana, is vested in

a Group d/b/a European Investments N V, P.O. Box 408, Durand, Michigan 48429, and that said European Investments N V constitutes part of an enterprise whose activity has resulted in the receipt of proceeds, directly or indirectly, derived from a pattern of racketeering activity and that said group has used the proceeds derived from such activities to acquire an interest in real property or to establish or to operate an enterprise; and that said group has knowingly or intentionally acquired or maintained, either directly or indirectly, an interest in or control of the real estate commonly known as 227 Pearl Street, Fort Wayne, Allen County, Indiana, and all of the contents therein, or an enterprise; and that said group has consistently employed individuals and induced individuals to be associated with an enterprise and has knowingly or intentionally caused those individuals to participate in the activities of that enterprise.

23. That Fort Wayne Books, Inc. and A Group d/b/a European Investments N V, in addition to the aforesaid acts, has from the 8th day of June, 1981 up to and including the date of the filing of this complaint used the real estate commonly known as 227 Pearl Street, Fort Wayne, Allen County, Indiana, as a place to establish an "enterprise" in that it has associated in fact during said period with Cinema Blue of Fort Wayne, Inc. and Erotica House Bookstore, Inc. That on the 6th day of July, 1978, the application for admission of Cinema Blue of Fort Wayne, Inc., a foreign corporation, to do business in the State of Indiana was filed and approved, such application for admission showing that same is a Delaware corporation who listed its local address as 2441 Broadway, Fort Wayne, Indiana 46807, and which in Article XII designated its resident agent for the purposes of legal process as C T Corporation System, same being located at 1011 Merchants

Bank Building, Indianapolis, Indiana 46204. Further, its association in fact is demonstrated by the Certificate of Incorporation of Erotica House Bookstores, Inc., which was duly admitted on the 3rd day of March, 1980, and whose Articles of Incorporation show that the designated corporate agent for legal process for said corporation is C T Corporation System, 1011 Merchants Bank Building, Indianapolis, Indiana 46204, and that its principal office is 1011 Merchants Bank Building, Indianapolis, Indiana 46204.

24. That on or about the 15th day of March, 1984, the enterprise doing business as Fort Wayne Books, Inc. did employ one Mark A. Brooks, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said corporation's business address, 227 Pearl Street, Fort Wayne, Allen County, Indiana, said Mark A. Brooks did then and there violate Indiana Code 35-49-3-1 in that he unlawfully and knowingly exhibited to another person obscene matter on four occasions on said date. By way of example and not limitation, said Mark A. Brooks did sell "tokens" to Fort Wayne police officers for the express purpose of allowing said persons to operate certain "video machines" within said establishment. That Fort Wayne police officers did purchase said tokens and view four "motion or video pictures" on said date and that it was the belief of said officers that said motion pictures which they saw were obscene in that the average person, applying contemporary community standards, would find that the dominant theme of the matter

or performance in said films, taken as a whole, appeal to the prurient interest in sex; and that the matter or performance depicted in a patently offensive way sexual conduct; and that the matter in the films taken as a whole, lacked serious literary, artistic, political or scientific value.

25. That on or about the 16th day of March, 1984, the enterprise doing business as Fort Wayne Books, Inc. did employ personnel who were associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within their actual authority and in the normal course of business at said corporation's business address, 227 Pearl Street, Fort Wayne, Allen County, Indiana, said personnel did then and there violate Indiana Code 35-49-3-1 in that they unlawfully and knowingly exhibited to another person obscene matter on twelve occasions on said date. By way of example and not limitation, said personnel did sell "tokens" to Fort Wayne police officers for the express purpose of allowing said persons to operate certain "video machines" within said establishment. That Fort Wayne police officers did purchase said tokens and view twelve "motion or video pictures" on said date and that it was the belief of said officers that said motion pictures which they saw were obscene in that the average person, applying contemporary community standards, would find that the dominant theme of the matter or performance in said films, taken as a whole, appeal to the prurient interest in sex; and that the matter or performance depicted in a patently offensive way sexual conduct; and that the matter in the films taken as a whole, lacked serious literary, artistic, political or scientific value.

II.

That the defendant Cinema Blue of Fort Wayne, Inc. has since the 8th day of June, 1981, up to and including the date of the filing of this complaint:

a) offered to distribute, distributed, or exhibited to another person obscene matter; and

b) that said Cinema Blue of Fort Wayne, Inc. has during said period of time attempted to commit, or conspired to commit, or aided and abetted in a violation of Indiana Code 35-30-10.1-2 and Indiana Code 35-49-3-1 and 35-45-6-2; and

c) that Cinema Blue of Fort Wayne, Inc. has "associated in fact" with Fort Wayne Books, Inc., Erotica House Bookstore, Inc., Donald Krontz personally and as a manager and member of the board of directors of the aforesaid corporations, the other defendants named herein and individuals not known to your plaintiff in at least two incidents of racketeering activity that have had the same or similar intent, result, accomplice, victim, or method of commission and that as a result of such actions the defendant Cinema Blue of Fort Wayne, Inc. has received proceeds directly or indirectly from a pattern of racketeering activity; and

d) that said corporation has used or invested those proceeds to acquire an interest in real property or to establish or to operate the enterprise; and

e) that through said pattern of activity said corporation has knowingly or intentionally acquired or maintained, either directly or indirectly, an interest in or control of real property or an enterprise; and

f) that said corporation has employed Donald Krontz and others not known to your plaintiff who have been employed and associated with the enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise through a pattern of "racketeering activity".

In support thereof your plaintiff further alleges as follows:

1. That Cinema Blue of Fort Wayne, Inc. is a Delaware corporation which received its "Certificate of Admission" to operate in the State of Indiana on the 6th day of July, 1978, and which has continued its operation in the State of Indiana up to and including the date of the filing of this complaint.

2. That the "Certificate of Admission" for said corporation establishes the name and address of the corporate resident agent for service of process as C T Corporation System and listed its address as 1011 Merchants Bank Building, Indianapolis, Indiana 46204. Further, that said "Certificate of Admission" cites the legal address of said corporation in the State of Indiana as 1011 Merchants Bank Building, Indianapolis, Indiana 46204.

3. That said Cinema Blue of Fort Wayne, Inc. has from 1981 up to and including the date of the filing of this complaint operated its principal activities and acts at 2441 Broadway, in the City of Fort Wayne, County of Allen, State of Indiana.

4. That on July 1, 1983 and, to the best of your petitioner's knowledge, up to the date of the filing of this complaint Donald Krontz was employed by Cinema Blue of Fort Wayne, Inc. as the manager of said corporation and was simultaneously employed by Fort Wayne Books, Inc. as the manager of that corporation and was employed by Erotica House Bookstore, Inc. as the manager of that corporation. That simultaneously Mr. Donald Krontz is and has been a member of the board of directors of all three of said corporations.

5. That on the 4th day of February, 1982, Suzanne Krontz did knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2 to a Fort Wayne police officer. That said Suzanne Krontz was convicted by the Allen Superior Court in Cause No. CRM-82-2769 of said violation. That at the time of said offense said Suzanne Krontz was an agent of the corporation acting within her actual authority in the normal course of business at 2441 Broadway in the City of Fort Wayne, County of Allen, State of Indiana, for and on behalf of Cinema Blue of Fort Wayne, Inc.

6. That on or about the 16th day of February, 1982 Cinema Blue of Fort Wayne, Inc. operated a store in Allen County, Indiana, at 2441 Broadway, Fort Wayne, Indiana, and that said corporation did on the 16th day of February, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Suzanne Krontz, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-2770, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

7. That on the 10th day of June, 1982 Lloyd C. Ashley did knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2 to a Fort Wayne police officer. That said Lloyd C. Ashley was convicted by the Allen Superior Court in Cause No. CRM-82-14251 of said violation. That at the time of said offense said Lloyd C. Ashley was an agent of the corporation acting within his actual authority in the normal course of business at 2441 Broadway, Fort Wayne, Allen County,

Indiana, for and on behalf of Cinema Blue of Fort Wayne, Inc.

8. That on or about the 1st day of July, 1982 Cinema Blue of Fort Wayne, Inc. operated a store in Allen County, Indiana, at 2441 Broadway, Fort Wayne, Indiana, and that said corporation did on the 1st day of July, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Lloyd C. Ashley, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-16917, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

9. That on the 8th day of July, 1982, Ronald E. Richards, Jr. did knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2 to a Fort Wayne police officer. That said Ronald E. Richard, Jr. was convicted by the Allen Superior Court in Cause No. CRM-82-14258 of said violation. That at the time of said offense said Ronald E. Richards, Jr. was an agent of the corporation acting within his actual authority in the normal course of business at 2441 Broadway in the City of Fort Wayne, County of Allen, State of Indiana, for and on behalf of Cinema Blue of Fort Wayne, Inc.

10. That on or about the 14th day of September, 1982, Cinema Blue of Fort Wayne, Inc. operated a store in Allen County, Indiana, at 2441 Broadway, Fort Wayne, Indiana, and that said corporation did on the 14th day of September 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Nancy L. Johnson a/k/a Nancy Schwass Johnson, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-16923, same being a violation of Indiana Code 35-30-10.1-2, Sales of Obscene Matter.

11. That on or about the 1st day of December, 1982, Cinema Blue of Fort Wayne, Inc. operated a store in Allen County, Indiana, at 2441 Broadway, Fort Wayne, Indiana, and that said corporation did on the 1st day of December, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Mary Kathleen Krontz, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-22451, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

12. That on or about the 21st day of November, 1983, Cinema Blue of Fort Wayne, Inc. did employ one Ronald E. Richards, Jr., who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Cinema Blue of Fort Wayne, Inc. within his actual authority and in the normal course of business at said corporation's business address, 2441 Broadway, Fort Wayne, Allen County, Indiana, on or about the 21st day of November, 1983, at the County of Allen, State of Indiana, said Ronald E. Richards, Jr. did then and there violate Indiana Code 35-49-3-1 in that he unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Bitch In Heat". That said Ronald E. Richards, Jr. was convicted in the Allen Superior Court of Count I of Cause No. CR 83-511. That Ronald E. Richards, Jr. was not only an employee

of Cinema Blue of Fort Wayne, Inc. but that he was also an employee of Erotica House Bookstore, Inc., 930 Broadway, in that on December 7, 1983, said Ronald E. Richards, Jr., who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for Cinema Blue of Fort Wayne, Inc. and Erotica House Bookstore, Inc. at Erotica House Bookstore, Inc. business address 930 Broadway, Fort Wayne, Allen County, Indiana, on or about the 7th day of December, 1983, at the County of Allen, State of Indiana, said Ronald E. Richards, Jr. did then and there violate Indiana Code 35-49-3-1 in that he unlawfully and knowingly distributed obscene matter for consideration to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Wet Fantasies". That said Ronald E. Richards, Jr. was convicted in Count II of Cause No. CR-83-511 in the Allen Superior Court.

13. That on or about the 22nd day of November, 1983 and the 30th day of November, 1983, Cinema Blue of Fort Wayne, Inc. did employ one Mary Kathleen Krontz, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Cinema Blue of Fort Wayne, Inc. within her actual authority and in the normal course of business at said corporation's business address, 2441 Broadway, Fort Wayne, Allen County, Indiana, on or about the 22nd and 30th days of November, 1983, respectively, at the County of Allen, State of Indiana, said Mary Kathleen Krontz did then and there violate Indiana Code 35-49-3-1 in that she unlawfully and knowingly distributed obscene matter

for consideration, to-wit: by selling respectively a certain obscene publication, to-wit: a magazine entitled "Leather Bound" and a magazine entitled "Nazi Lust". That Mary Kathleen Krontz was convicted in Allen Superior Court of said offenses in Counts I and II of Cause No. CR-83-512.

14. That Cinema Blue of Fort Wayne, Inc. and A Group d/b/a/ Theatre A Corporation, in addition to the aforesaid acts, has from the 8th day of June, 1981 up to and including the date of the filing of this complaint used the real estate commonly known as 2441 Broadway, Fort Wayne, Allen County, Indiana, as a place to offer to distribute, distribute, and exhibit to other persons obscene matter of a similar nature as set forth in this complaint.

15. That Cinema Blue of Fort Wayne, Inc. and A Group d/b/a Theatre A Corporation, in addition to the aforestated acts, has from the 8th day of June, 1981 up to and including the date of the filing of this complaint used the real estate commonly known as 2441 Broadway, Fort Wayne, Allen County, Indiana:

a) as a place to gather for distribution, display, and offer to other persons for consideration similar obscene matter and have continued to commit, or to attempt to commit, or to conspire to commit, or to aid and abet in violation of Indiana Code 35-45-6-2 and 35-30-10.1-2 and Indiana Code 35-49-3-1;

b) that the Group d/b/a Theatre A Corporation, 819 Southeast Second Street, Evansville, Indiana 47713, holds legal title to said real estate and that said group as a result of this continued activity has profited from the receipt of proceeds, directly or indirectly, derived from a pattern of racketeering activity and that said group has used the proceeds derived from such activities to acquire an interest in real property or to establish or to operate an enterprise;

c) that said group has knowingly or intentionally acquired or maintained, either directly or indirectly, an interest in or control of the real estate commonly known as 2441 Broadway, Fort Wayne, Allen County, Indiana, and all of the contents therein, or an enterprise; and

d) that said group has consistently employed individuals and induced individuals to be associated with an enterprise and has knowingly or intentionally caused those individuals to participate in the activities of that enterprise.

16. That Cinema Blue of Fort Wayne, Inc., in addition to the aforestated acts, has from the 8th day of June, 1981 up to and including the date of the filing of this complaint used the real estate commonly known as 2441 Broadway, Fort Wayne, Allen County, Indiana, as a place to establish an "enterprise" in that it has associated in fact during said period with Fort Wayne Books, Inc. and Erotica House Bookstore, Inc. That Fort Wayne Books, Inc. is an Indiana corporation which began its corporate existence on the 4th day of April 1979, whose Articles of Incorporation show C T Corporation System as its agent for lawful process, same being located at 1011 Merchants Bank Building, Indianapolis, Indiana 46204. Further, it is associated in fact with Erotica House Bookstore, Inc. whose Certificate of Incorporation with the State of Indiana shows that same was duly admitted on the 3rd day of March, 1980, and whose Articles of Incorporation show that the designated corporate agent for legal process for said corporation is C T Corporation System, 1011 Merchants Bank Building, Indiannapolis, Indiana 46204, and that its principal office is 1011 Merchants Bank Building, Indianapolis, Indiana 46204.

17. That on or about the 15th day of March, 1984, the enterprise doing business as Cinema Blue of Fort Wayne, Inc. did employ personnel who were associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Cinema Blue of Fort Wayne, Inc. within their actual authority and in the normal course of business at said corporation's business address, 2441 Broadway, Fort Wayne, Allen County, Indiana, said personnel did then and there violate Indiana Code 35-49-3-1 in that they unlawfully and knowingly exhibited to another person obscene matter on six occasions on said date. By way of example and not limitation, said personnel did sell "tokens" to Fort Wayne police officers for the express purpose of allowing said persons to operate certain "video machines" within said establishment. That Fort Wayne police officers did purchase said tokens and view six "motion or video pictures" on said date and that it was the belief of said officers that said motion pictures which they saw were obscene in that the average person, applying contemporary community standards, would find that the dominant theme of the matter or performance in said films, taken as a whole, appeal to the prurient interest in sex; and that the matter or performance depicted in a patently offensive way sexual conduct; and that the matter in the films taken as a whole, lacked serious literary, artistic, political or scientific value.

18. That on or about the 16th day of March, 1984, the enterprise doing business as Cinema Blue of Fort Wayne, Inc. did employ personnel who were associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of

that enterprise in that while acting as an agent for said Cinema Blue of Fort Wayne, Inc. within their actual authority and in the normal course of business at said corporation's business address, 2441 Broadway, Fort Wayne, Allen County, Indiana, said personnel did then and there violate Indiana Code 35-49-3-1 in that they unlawfully and knowingly exhibited to another person obscene matter on two occasions on said date. By way of example and not limitation, said personnel did sell "tokens" to Fort Wayne police officers for the express purpose of allowing said persons to operate certain "video machines" within said establishment. That Fort Wayne police officers did purchase said tokens and view two "motion or video pictures" on said date and that it was the belief of said officers that said motion pictures which they saw were obscene in that the average person, applying contemporary community standards, would find that the dominant theme of the matter or performance in said films, taken as a whole, appeal to the prurient interest in sex; and that the matter or performance depicted in a patently offensive way sexual conduct; and that the matter in the films taken as a whole, lacked serious literary, artistic, political or scientific value.

III.

That the defendant Erotica House Bookstore, Inc. has since the 8th day of June, 1981, up to and including the date of the filing of this complaint:

a) offered to distribute, distributed, or exhibited to another person obscene matter; and

b) that said Erotica House Bookstore, Inc. has during said period of time attempted to commit or conspired to commit, or aided and abetted in a violation of Indiana Codes 35-30-10.1-2, 35-49-3-1, and 35-45-6-2; and

c) that Erotica House Bookstore, Inc. has "associated in fact" with Cinema Blue of Fort Wayne, Inc., Fort Wayne Books, Inc., Donald Grontz personally and as a manager and member of the board of directors of the aforesaid corporations, the other defendants named herein and individuals not known to your plaintiff, in at least two incidents of racketeering activity that have had the same or similar intent, result, accomplice, victim, or method of commission and that as a result of such actions the defendant Erotica House Bookstore, Inc. has received proceeds directly or indirectly derived from a pattern of racketeering activity; and

d) that said corporation has used or invested those proceeds to acquire an interest in real property or to establish or to operate the enterprise; and

e) that through said pattern of activity said corporation has knowingly or intentionally acquired or maintained, either directly or indirectly, an interest or control of real property or an enterprise; and

f) that said corporation has employed Donald Krontz and others not known to your plaintiff who have been employed and associated with the enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise through a pattern of "racketeering activity".

In support thereof your plaintiff further alleges as follows:

1. That Erotica House Bookstore, Inc. is an Indiana corporation which began its corporate existence on the 3rd day of March, 1980, and which has continued in existence up to and including the date of the filing of this complaint.

2. That the Certificate of Incorporation of Erotica House Bookstore, Inc. establishes the name and address of the corporate resident agent for service of process as C T Corporation System and lists its address as 1011 Merchants Bank Building, Indianapolis, Indiana 46204, and that said Articles of Incorporation indicate that the principal office of said corporation and the post office address of the corporation is 1011 Merchants Bank Building, Indianapolis, Indiana 46204.

3. That Erotica House Bookstore, Inc. has from 1981 up to and including the date of the filing of this complaint operated its principal activities and acts at 930 Broadway, Fort Wayne, Allen County, Indiana.

4. That on July 1, 1983 and, to the best of your petitioner's knowledge, up to the date of the filing of this complaint Donald Krontz was employed by Erotica House Bookstore, Inc. as the manager of said corporation and was simultaneously employed by Cinema Blue of Fort Wayne, Inc. as the manager of that corporation and was employed by Fort Wayne Books, Inc. as the manager of that corporation. That simultaneously Mr. Krontz is and has been a member of the board of directors of all three of said corporations.

5. That on or about the 15th day of June, 1981, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 15th day of June, 1981 violate Indiana Code 35-30-10.1-2 in that its human agent, Lee Bickel, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-81-9439, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

6. That on or about the 2nd day of February, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Boardway and that said corporation did on the 2nd day of February, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Lee Bickel, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-2767, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

7. That on or about the 10th day of February, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway and that said corporation did on the 10th day of February, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Lee Joseph Bickel a/k/a Lee Bickel, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-2768, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

8. That on or about the 7th day of June, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 7th day of June, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Anthony L. Leedy, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-14257, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

9. That on or about the 7th day of July, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 7th day of July, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Lee J. Bickel, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-14252, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

10. That on or about the 2nd day of August, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 2nd day of August, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Nancy Schwass a/k/a Nancy L. Johnson, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-14256, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

11. That on or about the 4th day of August, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 4th day of August, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Lee J. Bickel, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-16919, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

12. That on or about the 10th day of August, 1982, Erotica House Bookstore, Inc. operated a store in Allen

County, Indiana at 930 Broadway, and that said corporation did on the 10th day of August, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Lee Joseph Bickel, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-16918, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

13. That on or about the 18th day of August, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 18th day of August, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Nancy Schwass Johnson a/k/a Nancy L. Johnson, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-16924, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

14. That on or about the 25th day of August, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 25th day of August, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, James P. Harp, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-16922, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

15. That on September 14, 1982 James D. Fry did knowingly distribute obscene matter for consideration in

violation of Indiana Code 35-30-10.1-2 to a Fort Wayne police officer. That said James D. Fry was convicted by the Allen Superior Court in Cause No. CRM-82-16920 of said violation. That at the time of said offense said James D. Fry was an agent of the corporation acting within his actual authority in the normal course of business at 930 Broadway, Fort Wayne, Indiana, for and on behalf of Erotica House Bookstore, Inc.

16. That on September 14, 1982 James D. Fry did knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2 to a Fort Wayne police officer. That said James D. Fry was convicted by the Allen Superior Court in Cause No. CRM-82-16921 of said violation. That at the time of said offense James D. Fry was an agent of the corporation acting within his actual authority in the normal course of business at 930 Broadway, Fort Wayne, Indiana, for and on behalf of Erotica House Bookstore, Inc.

17. That on September 28, 1982 James D. Fry did knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2 to a Fort Wayne police officer. That said James D. Fry was convicted by the Allen Superior Court in Cause No. CRM-82-22383 of said violation. That at the time of said offense James D. Fry was an agent of the corporation acting within his actual authority in the normal course of business at 930 Broadway, Fort Wayne, Indiana, for and on behalf of Erotica House Bookstore, Inc.

18. That on or about the 29th day of September, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 29th day of September, 1982 violate Indiana

Code 35-30-10.1-2 in that its human agent, James P. Harp, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-222, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

19. That on or about the 9th day of May, 1983, Erotica House Bookstore, Inc. did employ one Deal L. Maggart, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within his actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, did on the 9th day of May, 1983, in the County of Allen and in the State of Indiana, then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: that Dean L. Maggart did then and there unlawfully and knowingly distribute obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Bitch In Control". That said Dean L. Maggart was convicted in Allen Superior Court of said offense in Count I of Cause CR-83-385.

20. That on or about the 11th day of May, 1983, Erotica House Bookstore, Inc. did employ one Dean L. Maggart, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc.

within his actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, did on the 11th day of May, 1983, in the County of Allen and in the State of Indiana then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: that Dean L. Maggart did then and there unlawfully and knowingly distribute obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Rubber Bondage". That said Dean L. Maggart was convicted of said offense in the Allen Superior Court in Count II of Cause CR-83-385.

21. That on or about the 3rd day of June, 1983, Erotica House Bookstore, Inc. did employ one Dean L. Maggart, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within his actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, did on the 3rd day of June, 1983, in the County of Allen and in the State of Indiana, then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: That Dean L. Maggart did then and there unlawfully and knowingly distribute obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Demanding". That said Dean L. Maggart was convicted of said offense in the Allen Superior Court in Count III of Cause CR-83-385.

22. That on or about the 9th day of May, 1983, Erotica House Bookstore, Inc. did employ one Robby D. Woods, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within his actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, did on the 9th day of May, 1983, in the County of Allen and in the State of Indiana, then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: that Robby D. Woods did then and there unlawfully and knowingly distribute obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Bizarre Fantasies". That said Robby D. Woods was convicted of said offense in the Allen Superior Court in Count I of Cause CR-83-383.

23. That on or about the 11th day of May, 1983, Erotica House Bookstore, Inc. did employ one Robby D. Woods, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within his actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, did on the 11th day of May, 1983, in the County of Allen and in the State of Indiana, then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: that Robby D. Woods did then and there unlawfully and knowingly distribute obscene

matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Kinky World". That said Robby D. Woods was convicted of said offense in the Allen Superior Court in Count II of Cause No. CR-83-383.

24. That on or about the 7th day of June, 1983, Erotica House Bookstore, Inc. did employ one Robby D. Woods, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within his actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, did on the 7th day of June, 1983, in the County of Allen and in the State of Indiana, then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: that Robby D. Woods did then and there unlawfully and knowingly distribute obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Bizarre Contacts". That said Robby D. Woods was convicted of said offense in the Allen Superior Court in Count III of Cause CR-83-383.

25. That on or about the 15th day of March, 1984, Erotica House Bookstore, Inc. did employ one white female approximately 5′ 6″ tall approximately 130#, in her twenties, whose name is believed to be _____, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as

an agent for said Erotica House Bookstore, Inc. within her actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, on or about the 15th day of March, 1984, at the County of Allen, State of Indiana, said employee did then and there violate Indiana Code 35-49-3-1 in that she unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling two obscene publications, to-wit: a magazine entitled "Cock-Biter" and a magazine entitled "Ass Attack". Said magazines showing male and female human beings engaged in sadomasochistic abuse and sexual activity, without any restrictions which the average person applying contemporary community standards must find that the dominant theme of said alleged matters, taken as a whole, appeal to the prurient interest in sex; and said matter depicts in a patently offensive way sexual conduct; the matter taken as a whole lacks serious literary, artistic, political or scientific value, knowing the above to be true, all of which is contrary to the form of the statute in such cases made and provided. That said material was sold to an officer of the Fort Wayne Police Department.

26. That on or about the 15th day of March, 1984, Erotica House Bookstore, Inc. did employ one Nancy S. Johnson, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within her actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, on or

about the 15th day of March, 1984, at the County of Allen, State of Indiana, said Nancy S. Johnson did then and there violate Indiana Code 35-49-3-1 in that she unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Dick, Tit, Ass Fucker", the front cover of the same showing a female white and male whites engaged in sexual activity, and on the back cover a female white and male whites engaged in sexual activity, without any restrictions, which the average person applying contemporary community standards must find that the dominant theme of said magazine, taken as a whole, appeal to the prurient interest in sex; and said matter depicts in a patently offensive way sexual conduct; the matter taken as a whole lacks serious literary, artistic, political or scientific value, knowing the above to be true all of which is contrary to the form of the statute in such cases made and provided. That said material was sold to a police officer with the Fort Wayne Police Department.

27. That on or about the 16th day of March, 1984, Erotica House Bookstore, Inc. did employ one female white approximately 5' 6" tall, approximately 130# in her twenties, whose name is unknown but believed to be .....,
who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within her actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, on or about the 16th day of March, 1984, at the County of Allen, State of

Indiana, said employee did then and there violate Indiana Code 35-49-3-1 in that she unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling two obscene publications, to-wit: a magazine entitled "Anal Thrust", the front cover of same showing a male white and a female white engaged in sexual activity and the back cover showing a male white and a female white engaged in sexual activity; and, a magazine entitled "Anal Virgin", the front cover showing sexual activity and carries the words "She learned the hard way" and the back cover showing a male white and female white engaged in sexual activity; said magazines showing sexual activity without any restrictions which the average person applying contemporary community standards must find that the dominant theme of said alleged matters, taken as a whole, appeal to the prurient interest in sex; and said matter depicts in a patently offensive way sexual conduct; the matter taken as a whole lacks serious literary, artistic, political or scientific value, knowing the above to be true, all of which is contrary to the form of the statute in such cases made and provided. Said material was sold to a police officer with the Fort Wayne Police Department.

28. That on or about the 16th day of March, 1984, the enterprise doing business as Erotica House Bookstore, Inc. did employ personnel who were associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within their actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, said personnel did then and there vio-

late Indiana Code 35-49-3-1 in that they unlawfully and knowingly exhibited to another person obscene matter on three occasions on said date. By way of example and not limitation, said personnel did allow the use of tokens by police officers for the express purpose of allowing said persons to operate certain "video machines" within said establishment. That Fort Wayne police officers did purchase said tokens from Cinema Blue and view three "motion or video pictures" at Erotica House on said date and that it was the belief of said officers that said motion pictures which they saw were obscene in that the average person, applying contemporary community standards, would find that the dominant theme of the matter or performance in said films, taken as a whole, appeal to the prurient interest in sex; and that the matter or performance depicted in a patently offensive way sexual conduct; and that the matter in the films taken as a whole lack serious literary, artistic, political or scientific value.

29. That Erotica House Bookstore, Inc. and Mr. Cyrus B. Cooper, in addition to the aforesaid acts, have from the 8th day of June, 1981, up to and including the date of the filing of this complaint, used or allowed to be used the real estate commonly known as 930 Broadway, Fort Wayne, Allen County, Indiana, as a place to offer to distribute, distribute, and exhibit to other persons obscene matter of a similar nature as set forth in this complaint.

30. That Erotica House Bookstore, Inc. and Mr. Cyrus B. Cooper, in addition to the aforesaid acts, have from the 8th day of June, 1981, up to and including the date of the filing of this complaint:

a) used or allowed the use of the real estate commonly known as 930 Broadway, Fort Wayne, Allen County, Indiana, as a place to gather for distribution, display, and offer to others for consideration simi'ar obscene matter and have continued to commit, or to at'empt to commit, or to conspire to commit, or to aid and abet in violation of Indiana Code 35-45-6-2 and Indiana Code 35-30-10.1-2 or Indiana Code 35-49-3-1; and

b) that title to said property is vested in Mr. Cyrus B. Cooper who has from the continued activity of the enterprise received proceeds, directly or indirectly, derived from a pattern of racketeering activity and that said corporation and Mr. Cyrus B. Cooper have used the proceeds derived from such activities to acquire an interest in real property or to establish or to operate an enterprise; and

c) that said corporation and/or Mr. Cyrus B. Cooper have knowingly or intentionally acquired or maintained, either directly or indirectly, an interest in or control of the real estate commonly known as 930 Broadway, Fort Wayne, Allen County, Indiana, and all of the contents therein, or an enterprise; and

d) that said corporation and/or Mr. Cyrus B. Cooper have consistently employed individuals and induced individuals to be associated with an enterprise and have knowingly or intentionally caused those individuals to participate in the activities of that enterprise.

31. That Erotica House Bookstore, Inc. in addition to the aforesaid acts, has from the 8th day of June, 1981, up to and including the date of the filing this complaint, used the real estate commonly known as 930 Broadway, Fort Wayne, Allen County, Indiana, as a place to establish an "enterprise" in that it has associated in fact during said period with Fort Wayne Books, Inc. and Cinema Blue of Fort Wayne, Inc. That on the 6th day of July, 1978, the

application for admission of Cinema Blue of Fort Wayne, Inc., a foreign corporation, to do business in the State of Indiana was filed and approved, such application for admission showing that same is a Delaware corporation who lists its local address as 2441 Broadway, Fort Wayne, Indiana 46807, and which in Article XII designated its resident agent for the purposes of legal process as C T Corporation System, same being located at 1011 Merchants Bank Building, Indianapolis, Indiana 46204. Further, its association in fact is demonstrated by the Certificate of Incorporation of Fort Wayne Books, Inc., which was duly admitted as an Indiana corporation on the 4th day of April, 1979, and whose Articles of Incorporation show that the designated corporate agent for legal process for said corporation is C T Corporation System, 1011 Merchants Bank Building, Indianapolis, Indiana 46204, and that its principal office is 1011 Merchants Bank Building, Indianapolis, Indiana 46204.

WHEREFORE, plaintiff prays the Court for judgment against the defendants, and each of them, as follows:

1. That the Court order the suspension or revocation of any license, permit, or prior approval granted to any of the defendants by any agency of the State;

2. That the Court order the forfeiture of the Charter of each of the defendants which are corporations organized under the laws of the State of Indiana and the revocation of the Certificate authorizing a foreign corporation to conduct business within the state of each of the defendants which are a foreign corporation so as to prevent future criminal activity and to protect the public interests;

3. To find that the defendants have as a "group" conducted an enterprise which has violated Indiana Code 35-45-6-2 and that it is in the public interest to prevent criminal activity that a permanent injunction be ordered against all of the defendants directing them to refrain from further violations of Indiana Code 35-45-6-2;

4. That the Court, in order to make effective its permanent injunction, order the dissolution of the enterprise and impose reasonable restrictions upon the future activities of investments of each and every defendant, including reasonable provisions prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which said defendant was engaged in violation of Indiana Code 35-45-6-2;

5. That the Court order each and every defendant to divest itself of any interest in the enterprise, including all personal and real property;

6. That the Court order the defendants to immediately list and state the location of all property, real or personal, tangible or intangible, including money and bank accounts, of any type, that the defendants own, or have title to, or any right, interest or equity in;

7. That pursuant to Indiana Code 34-4-30.5-3 (a) the Court order the forfeiture of all property, real or personal, tangible or intangible where said property was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of Indiana Code 35-45-6-2:

a) by way of example and not limitation, the State specifically asks for the forfeiture of that certain real estate commonly known as 227 Pearl Street, Fort

Wayne, Allen County, Indiana, together with all of its contents whether same be real or personal;

b) by way of example and not limitation, the State specifically asks for the forfeiture of that certain real estate commonly known at 930 Broadway, Fort Wayne, Allen County, Indiana, together with all of its contents whether same be real or personal;

c) by way of example and not limitation, the State specifically asks for the forfeiture of that certain real estate commonly known as 2441 Broadway, Fort Wayne, Allen County, Indiana, together with all of its contents whether same be real or personal;

8. That the Court order the forfeiture of all bank accounts of Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc.;

9. That the Court subject all personal and real properties, money, intangibles, and corporate interests and activities acquired or maintained in violation of Indiana Code 35-45-6-2 to Court supervision and order the defendants to refrain from disposing of, transferring, relocating, dissipating, or otherwise altering the status of said property, whether real or personal, tangible or intangible, or corporate entities, without prior approval of the Court;

10. Plaintiff prays the Court for an order sequestering and subjecting to Court supervision all bank accounts held by the individual and corporate defendants herein, and that upon a finding for plaintiff, the Court supervise the sale, transfer, or the disposition of all real and personal property, whether tangible or intangible, of said de-

fendant found subject to the act, and for all other relief deemed just and proper in the premises.

Respectfully submitted,

/s/ Stephen M. Sims
Stephen M. Sims
Prosecuting Attorney
38th Judicial Court
State of Indiana

(Certificate of Service omitted in printing.)

IN THE ALLEN CIRCUIT COURT

CAUSE NO. CC84-446

STATE OF INDIANA)
) ss:
COUNTY OF ALLEN)

STATE OF INDIANA AND STEPHEN M. SIMS, PROSECUTING ATTORNEY FOR THIRTY-EIGHTH JUDICIAL CIRCUIT,
Plaintiff,
vs.

FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., EROTICA HOUSE BOOKSTORE, INC., MR. DONALD KRONTZ; MR. DONALD KRONTZ IN HIS CAPACITY AS MANAGER OF FORT WAYNE BOOKS, INC., MANAGER OF CINEMA BLUE OF FORT WAYNE, INC., MANAGER OF EROTICA HOUSE BOOKSTORE, INC.; DR. DONALD KRONTZ IN HIS CAPACITY AS A MEMBER OF THE BOARD OF DIRECTORS OF FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., EROTICA HOUSE BOOKSTORE, INC.; MARK A. BROOKS, THE GROUP d/b/a/ EUROPEAN INVESTMENTS N V, THE GROUP d/b/a THEATRE A CORPORATION, NANCY S. JOHNSON, CYRUS B. COOPER,
Defendants.

VERIFIED PETITION FOR SEIZURE OF PROPERTY SUBJECT TO FORFEITURE AND PROBABLE CAUSE AFFIDAVIT

Comes now Stephen M. Sims, Prosecuting Attorney for the Thirty-Eighth Judicial Circuit, State of Indiana, and pursuant to Indiana Code 35-4-30.5-3 (b) respectfully moves this Court for an Order directing the Sheriff of Allen County to immediately seize and inventory all property "subject to forfeiture" as set forth in the complaint of your petitioner as heretofore filed in this cause on the 19th day of March, 1984, and in support thereof says as follows:

1. That your petitioner is the duly elected and serving Prosecutor for the Thirty-Eighth Judicial Circuit for the State of Indiana;

2. That your petitioner is, in his capacity as Prosecuting Attorney for said Judicial Circuit, the plaintiff in the above-entitled cause;

3. Your plaintiff hereby incorporates as an integral part hereof all of the allegations set forth in his "Complaint For Injunctive Relief From Corrupt Business Influence And Action For Forfeiture Of Property Incident To Corrupt Business Influence" heretofore filed by him in this cause pursuant to Indiana Code 34-4-30.5-2 and Indiana Code 34-4-30.5-3 (a) on the 19th day of March, 1984;

4. The plaintiff believes and has good cause to believe that a "group" or "enterprise" exists in Allen County, Indiana, and is maintaining certain real and personal property which is property used in the course of, intended for use in the course of, property derived from, or real-

ized through, conduct in violation of Indiana Code 35-45-6-2. In particular that the "enterprise" or "group" have used, are using, or plan to use certain real estate, buildings, and the entire contents of said buildings, same having been realized through, derived from, or are being used in the course of, or intended for use in the course of, conduct in violation of Indiana Code 35-45-6-2, in particular, the following real estate and contents:

a) certain real estate commonly known as Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, together with all of its contents whether same be real or personal;

b) certain real estate commonly known as Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, together with all of its contents whether same be real or personal;

c) certain real estate commonly known as Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, with all of its contents whether same be real or personal;

The State further asks for the immediate seizure and impoundment of the following personal property:

a) all of the bank accounts located in the State of Indiana in which Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., Erotica House Bookstore, Inc., have an interest or ownership;

b) all liquid assets located in the State of Indiana in which Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., Erotica House Bookstore, Inc. have an interest or ownership.

5. That your petitioner incorporates herein as Exhibit "A" the Probable Cause Affidavit executed by Fort Wayne police officer Charles Dennis and suggests to the

Court that said Probable Cause Affidavit, independently or in conjunction with testimony given by said officer on the 19th day of March, 1984, constitutes "probable cause" to believe that a violation of Indiana Code 35-45-6-2 is and has been continuing with regard to that certain real estate, personal property, including bank accounts as specifically set forth in Paragraph 4 of this petition.

WHEREFORE, pursuant to Indiana Code 34-4-30.5-3 (b) and Indiana Code 34-4-30.5-4 (b), your plaintiff prays this Court will enter an Order directing the Sheriff of Allen County to immediately seize that certain real estate, the buildings thereon, and all contents of said buildings commonly known as:

1. Certain real estate commonly known as Fort Wayne, Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana; together with all of its contents whether same be real or personal;
2. Certain real estate commonly known as Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, together with all of its contents whether same be real or personal;
3. Certain real estate commonly known as Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, with all of its contents whether same be real or personal;

by placing same under seal and inventorying same (as determined reasonable under all circumstances by said Sheriff) and authorizing said Sheriff to remove special items of property if, in his discretion, he deems same appropriate. That officers of the Fort Wayne Police Department be authorized to assist the Sheriff of Allen County in taking custody of any of the personal property or in securing any real property and maintaining same

under seal. Further, that any liquid assets of said three corporations, to-wit: Fort Wayne Books, Inc., Erotica House Bookstore, Inc., and Cinema Blue of Fort Wayne, Inc., within the State of Indiana, be frozen, seized or impounded through seal, pending forfeiture and final disposition of this cause.

The plaintiff further prays that the Court will award expenses and costs of this action and such reasonable attorney fees as the Court may deem appropriate to the Treasurer of Allen County, as a reimbursement to the County for extraordinary expenses and time expenditures involved in this action pursuant to Indiana Code 34-4-30.5-2 (6) and for all other just and proper relief in the premises.

Respectfully submitted,

/s/ Stephen M. Sims
Stephen M. Sims
Prosecuting Attorney
38th Judicial Circuit
State of Indiana

STATE OF INDIANA)
) SS:
COUNTY OF ALLEN)

I affirm under the penalties of perjury that the foregoing Verified Petition For Seizure of Property Subject To Forfeiture is true and accurate to the best of my knowledge and belief.

/s/ Stephen M. Sims
Prosecuting Attorney
38th Judicial Circuit
State of Indiana

(Certificate of Service omitted in printing.)

EXHIBIT "A"

IN THE ALLEN CIRCUIT COURT

CAUSE NO._____

STATE OF INDIANA)
) SS:
COUNTY OF ALLEN)

STATE OF INDIANA)
)
VS.)
)
FORT WAYNE BOOKS, INC.)
CINEMA BLUE OF FORT)
WAYNE, INC.)
EROTICA HOUSE BOOKSTORE,)
INC., MR. DONALD KRONTZ:)
MR. DONALD KRONTZ IN HIS)
CAPACITY AS MANAGER OF)
FORT WAYNE BOOKS, INC.,)
MANAGER OF CINEMA BLUE)
OF FORT WAYNE, INC.,)
MANAGER OF EROTICA)
HOUSE BOOKSTORE, INC.;)
MR. DONALD KRONTZ IN HIS)
CAPACITY AS A MEMBER OF)
THE BOARD OF DIRECTORS)
OF FORT WAYNE, INC.,)
CINEMA BLUE OF)
FORT WAYNE, INC.,)
EROTICA HOUSE BOOKSTORE,)
INC.; MARK A. BROOKS,)
THE GROUP d/b/a EUROPEAN)
INVESTMENTS N V,)
THE GROUP d/b/a THEATRE A)
CORPORATION, NANCY S.)
JOHNSON, CYRUS B. COOPER,)
)
Defendants.)

AFFIDAVIT FOR PROBABLE CAUSE

1. The undersigned swears and affirms, under the penalties for perjury, that he has good cause to believe that:

From on or about the 8th day of June, 1981, up to and including the 19th day of March, 1984, at the County of Allen and in the State of Indiana, said defendants did as a "group" or "enterprise" knowingly or intentionally receive proceeds directly or indirectly, derived from a pattern of racketeering activity, and that said defendants as a "group" or "enterprise" used or invested those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise; and that through a pattern of "racketeering activity", knowingly or intentionally acquired or maintained, either directly or indirectly, an interest in or control of real property or an enterprise; or operating as a "group" or "enterprise" were employed by or associated with an enterprise, and that said "group" knowingly or intentionally conducted or otherwise participated in the activities of that enterprise through a pattern of racketeering activity; and that said defendants violated Indiana Code 35-30-10.1-2 and Indiana Code 35-49-3-1 and Indiana Code 35-45-6-2.

2. The defendants, respectively, are described as follows:

a) Fort Wayne Books, Inc. is a "group" or Indiana corporation which began its corporate existence on the 4th day of April, 1979, and which has continued in existence up to and including the date of the filing of this affidavit. Said defendant operates a business at 227 Pearl Street, Fort Wayne, Allen County, Indiana,

and has listed its resident agent as C T Corporation System, 1011 Merchants Bank Building, Indianapolis, Indiana 46204;

b) Cinema Blue of Fort Wayne, Inc., is a "group" or Delaware corporation which received its "Certificate of Admission" to operate in the State of Indiana on the 6th day of July, 1978, and which has continued its operation in the State of Indiana up to and including the date of the filing of this complaint. Said defendant has from 1981 up to and including the date of the filing of this complaint operated a business at 2441 Broadway, Fort Wayne, Allen County, Indiana. It has listed its resident agent for service of process as C T Corporation System, 1011 Merchants Bank Building, Indianapolis, Indiana 46204;

c) Erotica House Bookstore, Inc. is a "group" or Indiana corporation which began its corporate existence on the 3rd day of March, 1980, and which has continued in existence up to and including the date of the filing of this affidavit. That the Erotica House Bookstore, Inc. has from 1981 up to and including the date of the filing of this complaint operated a business at 930 Broadway, Fort Wayne, Allen County, Indiana. That said defendant has listed its resident agent for service of process as C T Corporation System, 1011 Merchants Bank Building, Indianapolis, Indiana 46204;

d) Mr. Donald Krontz, male white, age 26, date-of-birth 7/22/57, subject is approximately 5′ 9″ tall, 215#, complexion medium, build large, hair black, eyes hazel Social Security #313-64-1947, address: 8543 Marsh Road, Algonac, Michigan 48001;

e) Mark A. Brooks, male black, age 29, date-of-birth 3/6/55, Social Security #307-70-1786, address: 1145 Clay Street, Fort Wayne, Indiana 46802;

f) The Group d/b/a European Investments N V, whose last known address is P.O. Box 408, Durand, Michigan 48429;

g) The Group d/b/a Theatre A Corporation, a "group" or corporation whose address is 819 Southeast Second Street, Evansville, Indiana 47713;

h) Nancy S. Johnson, female white, age 45, date-of-birth 2/ /39, subject is approximately 5′ 2″ tall, 119#, Social Security #303-40-2855; business address: 227 Pearl Street, Fort Wayne, Indiana 46802;

i) Cyrus B. Cooper, male white, 4815 Old Mill Road, Fort Wayne, Indiana 46807.

2. That your affiant, Officer Charles Dennis, is a police officer with the Fort Wayne Police Department, Vice Division. That your affiant has from the 7th day of June, 1981, up to and including the date of this affidavit, had vice responsibilities with said Fort Wayne Police Department. That from the 7th day of June, 1981, up to and including the date of the filing of this affidavit, your affiant as a part of his duties with the Fort Wayne Police Department has continuously monitored the general activities of the following group:

a) Fort Wayne Books, Inc. located at 227 Pearl Street, Fort Wayne, Allen County, Indiana;

b) Cinema Blue of Fort Wayne, Inc. located at 2441 Broadway, Fort Wayne, Allen County, Indiana;

c) Erotica House Bookstore, Inc. located at 930 Broadway, Fort Wayne, Allen County, Indiana;

That in his official capacity as a Fort Wayne Police vice officer, your affiant has in the course of his investigation become aware of the following facts:

a) that the "group" or "enterprise" known as Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc. have operated at the addresses set forth hereinbefore con-

tinuously from the 8th day of June, 1981, up to and including the time of the filing of this affidavit;

b) that the defendant corporations or their employees acting in the normal course of business and with actual authority have been convicted by the Allen Superior Court of violations of Indiana Code 35-30-10.1-2 and Indiana Code 35-49-3-1, same being "Distribution of Obscene Matter For Consideration" in such a manner as to constitute a violation of Indiana Code 35-45-6-2.

By way of example, your affiant would show the Court that:

a) that Fort Wayne Books, Inc. did commit a criminal act on the 8th day of June, 1981, and that under Cause No. CRM-81-10113 said corporation was convicted of two counts of distributing obscene matter for consideration. That this criminal activity occurred at 227 Pearl Street, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Alan H. Sedelbauer;

b) that on or about the 15th day of June, 1981, Alan H. Sedelbauer did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Alan H. Sedelbauer was convicted in the Allen Superior Court in Cause No. CRM-81-10114;

c) that on or about the 11th day of February, 1982, Alan H. Sedelbauer did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Alan H. Sedelbauer was convicted in the Allen Superior Court in Cause No. CRM-82-2771;

d) that on or about the 13th day of May, 1982, James D. Fry did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said James D. Fry was convicted in the Allen Superior Court in Cause CRM-82-14254;

e) that on or about the 10th day of June, 1982, James D. Harp, did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said James D. Harp was convicted in the Allen Superior Court in Cause CRM-82-14255;

f) that on or about the 9th day of August, 1982, Barry W. Dangler, did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Barry W. Dangler was convicted in the Allen Superior Court in Cause No. CRM-82-14253;

g) that Fort Wayne Books, Inc. did commit a criminal act on the 28th day of September, 1982, and that under Cause No. CRM-82-22385 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 227 Pearl Street, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Daniel L. Morgan;

h) that Fort Wayne Books, Inc. did commit a criminal act on the 29th day of September, 1982, and that under Cause No. CRM-82-22386 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 227 Pearl Street, Fort Wayne, Allen

County, Indiana, and that the human agent for the book store was Daniel L. Morgan;

i) that Fort Wayne Books, Inc. did commit a criminal act on the 1st day of December, 1982, and that under Cause No. CRM-82-22452 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 227 Pearl Street, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Anthony L. Leedy;

j) that on or about the 9th day of May, 1983, the 10th day of May, 1983 and the 7th day of June, 1983, Daniel L. Morgan did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Daniel L. Morgan was convicted in the Allen Superior Court in Cause No. CR-83-384;

k) that on or about the 9th and 13th days of May, 1983, and the 3rd day of June, 1983, Mark A. Brooks did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Mark A. Brooks was convicted in the Allen Superior Court in Cause No. CR-83-386;

1) that on or about the 21st day of November, 1983, and the 5th day of December, 1983, Mark A. Brooks did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Mark A. Brooks was convicted in the Allen Superior Court in Cause No. CR-83-513;

m) that Erotica House Bookstore, Inc. did commit a criminal act on the 15th day of June, 1981, and that under Cause No. CRM-81-9439 said corporation was convicted of two counts of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Lee Bickel;

n) that Erotica House Bookstore, Inc. did commit a criminal act on the 2nd day of February, 1982, and that under Cause No. CRM-82-2767 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Lee Bickel;

o) that Erotica House Bookstore, Inc. did commit a criminal act on the 10th day of February, 1982, and that under Cause No. CRM-82-2768 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Lee Bickel;

p) that Erotica House Bookstore, Inc. did commit a criminal act on the 7th day of June, 1982, and that under Cause No. CRM-82-14257 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Anthony L. Leedy;

q) that Erotica House Bookstore, Inc. did commit a criminal act on the 7th day of July, 1982, and that under Cause No. CRM-82-14252 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen

County, Indiana, and that the human agent for the book store was Lee J. Bickel;

r) that Erotica House Bookstore, Inc. did commit a criminal act on the 2nd day of August, 1982, and that under Cause No. CRM-82-14256 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Nancy S. Johnson;

s) that Erotica House Bookstore, Inc. did commit a criminal act on the 4th day of August, 1982, and that under Cause No. CRM-82-16918 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana. and that the human agent for the book store was Lee J. Bickel;

t) that Erotica House Bookstore, Inc. did commit a criminal act on the 10th day of August, 1982, and that under Cause No. CRM-82-16919 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Lee Joseph Bickel;

u) that Erotica House Bookstore, Inc. did commit a criminal act on the 18th day of August, 1982, and that under Cause No. CRM-82-16924 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Nancy Johnson;

v) that Erotica House Bookstore, Inc. did commit a criminal act on the 25th day of August, 1982, and that under Cause No. CRM-82-16922 said corporation was convicted of distributing obscene matter

for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was James D. Harp;

w) that on or about the 14th day of September, 1982, James D. Fry did distribute obscene matter for consideration while acting as an agent for Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said James D. Fry was convicted in the Allen Superior Court in Cause No. CRM-82-16920;

x) that on or about the 14th day of September, 1982, James D. Fry did distribute obscene matter for consideration while acting as an agent for Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said James D. Fry was convicted in the Allen Superior Court in Cause No. CRM-82-16921;

y) that on or about the 28th day of September, 1982, James D. Fry did distribute obscene matter for consideration while acting as an agent for Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said James D. Fry was convicted in the Allen Superior Court in Cause No. CRM-82-22383;

z) that Erotica House Bookstore, Inc. did commit a criminal act on the 29th day of September, 1982, and that under Cause No. CRM-82-22384 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was James D. Harp;

aa) that on or about the 9th and 11th days of May, 1983 and the 7th day of June, 1983, Robbie D. Woods did distribute obscene matter for consideration while acting as an agent for Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Robbie D. Woods was convicted in the Allen Superior Court in Cause No. CR-83-383;

bb) that on or about the 21st and 29th days of November, 1983 and the 13th day of December, 1983, Dean L. Maggart did distribute obscene matter for consideration while acting as an agent for Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Dean L. Maggart was convicted in the Allen Superior Court in Cause No. CR-83-510;

cc) that on or about the 29th day of November, 1983 and the 1st day of December, 1983, Nancy S. Johnson did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Nancy S. Johnson was convicted in the Allen Superior Court in Cause No. CR-83-509;

dd) that on or about the 4th day of February, 1982 Suzanne Krontz did distribute obscene matter for consideration while acting as an agent for Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Suzanne Krontz was convicted in the Allen Superior Court in Cause No. CRM-82-2769;

ee) that Cinema Blue of Fort Wayne, Inc. did commit a criminal act on the 16th day of February, 1982, and that under Cause No. CRM-82-2770 said corporation was convicted of distributing obscene matter for consideration. That this criminal ac-

tivity occurred at 2441 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Suzanne Krontz;

ff) that Cinema Blue of Fort Wayne, Inc. did commit a criminal act on the 10th day of June, 1982, and that under Cause No. CRM-82-14251 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 2441 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Lloyd C. Ashley;

gg) that Cinema Blue of Fort Wayne, Inc. did commit a criminal act on the 1st day of July, 1982, and that under Cause No. CRM-82-16917 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 2441 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Lloyd C. Ashley;

hh) that on or about the 8th day of July, 1982, Ronald E. Richards, Jr. did distribute obscene matter for consideration while acting as an agent for Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Ronald E. Richards was convicted in the Allen Superior Court in Cause No. CRM-82-14258;

ii) that Cinema Blue of Fort Wayne, Inc. did commit a criminal act on the 14th day of September, 1982, and that under Cause No. CRM-82-16923 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 2441 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Nancy Johnson;

jj) that Cinema Blue of Fort Wayne, Inc. did commit a criminal act on the 1st day of December, 1982, and that under Cause No. CRM-82-22451 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 2441 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Mary K. Krontz;

kk) that on or about the 21st and 29th days of November, 1983, Ronald E. Richards, Jr. did distribute obscene matter for consideration while acting as an agent for Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Ronald E. Richards, Jr. was convicted of Counts I and III in Cause No. CR-83-511 in the Allen Superior Court;

ll) that on or about the 7th day of December, 1983, Ronald E. Richards, Jr. did distribute obscene matter for consideration while acting as an agent for Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Ronald E. Richards, Jr. was convicted of Count II in Cause No. CR-83-511 in the Allen Superior Court;

mm) that on or about the 22nd and 30th days of November, 1983, Mary Kathleen Krontz did distribute obscene matter for consideration while acting as an agent for Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Mary Kathleen Krontz was convicted in the Allen Superior Court of two counts in Cause No. CR-83-512.

4. Your affiant, Officer Charles Dennis, swears and affirms that in the course of his investigation he has reviewed all of the aforesaid cause numbers and has personally examined the charging information in each and every one of said charges and in addition thereto has personally examined a certified copy of the guilty

findings in each of said causes. That he has compared photo-copies of each of the charges and of the certified copies, personally inspecting all of same. That he attaches hereto as an integral part of his affidavit true and accurate photo-copies of the charges referred to hereinabove and copies of the findings of the Allen Superior Court in each of same. Said exhibits are marked "A-1 through A-39" inclusive as an integral part hereof.

5. That your affiant in the course of his duty has worked daily with Officer Dennis Anspach. That Dennis Anspach is and has been a member of the Fort Wayne Police Department assigned to the Vice Division and has been with such division for a period of approximately three years. That said Officer Dennis Anspach and your affiant have personally reviewed together a certain certified copy of a guilty plea at which Officer Dennis Anspach was personally present. That said guilty plea was State of Indiana v. Suzanne Krontz, Cause No. CRM-82-2770, State of Indiana v. Mary Kathleen Krontz, Cause No. CRM-82-22451 State of Indiana v. Lloyd C. Ashley, Cause No. CRM-82-16917 and CRM-82-14251, and State of Indiana v. Anthony L. Leedy, Cause No. CRM-82-14257 and CRM-82-22452, and State of Indiana v. Alan H. Sedelbauer, Cause No. CRM-81-10113, and State of Indiana v. James D. Harp, Cause No. CRM-82-16922 and CRM-82-22384 and CRM-82-14255 and CRM-82-05784. That both officers reviewed said certified copy and compared the certified copy with a photo-stat of same, which has been marked as Exhibit "A-40", and your affiant certifies that it is a true and accurate copy of

the guilty plea in the afore-captioned causes which took place on or about the 1st day of July, 1983, in the Allen Superior Court. Said Exhibit "A-40" is attached hereto as a true and accurate representation of what it purports to show as an integral part hereof.

6. Said Exhibit "A-40" demonstrates that Mr. Donald Krontz was an employee of Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc. In addition, said transcript clearly indicates that Mr. Donald Krontz was not only an employee but was the manager of each of said book stores and a member of the board of directors of each of said book stores.

7. That as an integral part of Exhibit "A-40" there was admitted into evidence the Certificate of Incorporation for Fort Wayne Books, Inc. and an action by unanimous consent of the sole members of the board of directors of Fort Wayne Books, Inc. as well as the Certificate of Incorporation for Erotica House Bookstore, Inc. and an action by unanimous consent of the sole members of the board of directors for said Erotica House Bookstore, Inc. and the Certificate of Admission of Cinema Blue of Fort Wayne, Inc. as well as an action by unanimous consent of the sole members of the board of directors of Cinema Blue of Fort Wayne, Inc., which are included herein as Exhibits "A-40, 41, 42, 43, 44, 45, and 46" respectively and your affiant certifies that they are true and accurate copies of those that went into evidence on July 1, 1983. Your affiant knows this because he has personally received the certified transcript and has compared these copies with the certified copy and has compared them in the

presence of Dennis Anspach to confirm their correctness.

8. That your affiant has interacted with other officers who, in checking public records to determine ownership, examined the Allen County Tax Statements of 1982 and 1983 re that certain property known as 227 Pearl Street, Fort Wayne, Allen County, Indiana. That your affiant attaches as Exhibit "A-47" a photocopy showing the party in interest as European Investments N V with a post office address of P.O. Box 408, Durand, Michigan. Further investigation by officers of the Vice Division in a review of the records of Erotica House Bookstore, Inc. show that Erotica House Bookstore, Inc. filed a business tangible personal property return Form 104 indicating that the place for assessment to be mailed for that corporation was: P.O. Box 408, Durand, Michigan 48429. A copy of said business tangible personal property return Form 104 is attached hereto as Exhibit "A-48". The conclusion which your affiant drew from examination of both of said documents indicates that the two entities are "in fact associated".

9. Further investigation by Vice Division officers produced an additional Allen County Tax Statement for 1981 payable 1982, a copy of which is attached hereto, confirming that Erotica House Bookstore, Inc. tax information was forwarded to P.O. Box 408, Durand, Michigan, attachment as Exhibit "A-49".

10. Your affiant swears that on or about the 15th day of March, 1984, he along with other vice officers of the Fort Wayne Police Department did enter that establishment commonly known as Fort Wayne Books, Inc. at 227 Pearl Street, Fort Wayne, Allen County, Indiana, and did observe one Mark A. Brooks, an employee of said establishment, on duty. That officers of the Fort Wayne Police Department purchased "tokens" from said Mark A. Brooks for the purpose of reviewing certain "video tapes" which are exhibited in said establishment. That your affiant, Officer Charles Dennis, did personally use said tokens to view video films in Booth 9, 10, 12 and 13 in said establishment. Those video booths being at the rear of said establishment. That after viewing said films, it was the belief of said officer that said motion pictures which he observed were obscene in that they depict in a patently offensive way sexual conduct and that the average person applying contemporary community standards would find that the dominant theme of the matter or performance taken as a whole appealed to the prurient interest in sex and that the films separately or jointly, taken as a whole, lacked serious literary, artistic, political or scientific value. That said officer took with him an audio recording device and described the scenes observed at the time that said films were viewed. That said officer has preserved those four audio cassettes and protected their chain of custody until bringing them to court today and they have been marked for evidence purposes as State's Exhibit "50, 51, 52 and 53, respectively".

11. That in addition, on or about the 16th day of March, 1984, your affiant and other Fort Wayne Police Department Vice Division officers did enter that enterprise known as Fort Wayne Books, Inc., 227 Pearl

Street, Fort Wayne, Allen County, Indiana, and did jointly purchase tokens and that said police officers jointly witnessed twelve films and that it was their belief and your affiant's belief that said motion pictures which they saw were obscene in that the average person applying contemporary community standards would find that the dominant theme of the matter of each and every film taken as a whole appealed to the prurient interest in sex and that the matter or performance depicted in a patently offensive way sexual conduct and that the matter in the films taken as a whole lacked serious literary, artistic, political, or scientific value. That the officers recorded their observations on audio equipment at that time and that said audio cassettes have been marked as State's Exhibits "54 through 65, inclusive". That said cassettes have been unaltered and have been preserved in the custody of the Vice Division of the Fort Wayne Police Department until brought to court on this date. That said twelve tapes, as well as Exhibits 50 through 53, inclusive, are true and accurate representations of what they purport to show.

12. That your affiant is aware that Fort Wayne Police Department Vice Officers working as a part of his division checked Allen County Tax Statements with regard to that certain property commonly known as 2441 Broadway, Fort Wayne, Allen County, Indiana. That a copy in the name of Theatre A Corporation, 819 Southeast Second Street, Evansville, Indiana 47713, and a true and accurate copy of said Tax Statement is included herein as Exhibit "A-66".

13. That on or about the 15th day of March, 1984, your affiant accompanied other officers of the Fort Wayne Police Department Vice Division to that real estate commonly known as Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana. That your affiant and other police officers used "tokens" and observed six films at said establishment. That it is the opinion of your affiant, who viewed three of said films, and Officer Joe DiFilippo, who viewed three of said films, that each and every one of said films seen on said "video machines" at said establishment were obscene in that the average person, applying contemporary community standards, would find that the dominant theme of the matter or performance in said films, taken as a whole, appeal to the prurient interest in sex; and that the matter or performance in each of said films depicted in a patently offensive way sexual conduct; and that the matter in each of said films, taken as a whole, lack serious literary, artistic, political or scientific value. That your affiant and Officer Joe DiFilippo carried with them a recording device and orally described what they observed on the screen in each said case and that the audio tapes have been preserved by the Fort Wayne Police Department Vice Division and remain unaltered and a true and accurate representation of what they purport to show. That they are attached hereto as Exhibits "A-67 through 72, inclusive".

14. That on or about the 16th day of March, 1984, your affiant personally went to the same establishment,

that is Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, and viewed an additional two films. That those films were, in the opinion of your affiant, obscene in that it is his belief from his experience that the average person, applying contemporary community standards, would find both of said films appeal to the prurient interest in sex; and that the matter or performance depicted in each of said films in a patently offensive way sexual conduct; and that the matter in each film, taken as a whole, lacked serious literary, artistic, poli[illegible]al or scientific value. That your affiant has preserv[illegible]d by means of audio descriptions taken at the time, two tapes describing the actions on those films, and that they are attached hereto in unaltered form as true and accurate representations of what they purport to show. State's Exhibits "73 and 74".

15. That your affiant, through investigation with other police officers of the Fort Wayne Police Department, has found that records indicate that Cyrus B. Cooper has an interest in that real estate commonly known as 930 Broadway, Fort Wayne, Allen County, Indiana.

16. That on March 15, 1984, your affiant went to that certain establishment called Erotica House Bookstore, Inc. at 930 Broadway, Fort Wayne, Allen County, Indiana, and did use "tokens" provided by the enterprise to view three video tapes or movies at said establishment. That at the time your affiant viewed said films, he carried with him an audio recorder whereby he did, on separate tapes, record what he

was observing with regard to said three films. That it is the belief of your affiant that each of said three films are pornographic inasmuch as they appeal to the prurient interest in sex and that the average person, applying contemporary community standards, would find that the dominant theme of the matter or performance of each of said films taken as a whole, appeal to the prurient interest in sex; and that the matter or performance depicts in a patently offensive way sexual conduct and that the matters in each film, taken as a whole, lack serious literary, artistic, political or scientific value. Your affiant has preserved intact said three tapes and has caused them to be marked as State's Exhibit "75, 76 and 77" herein. That each tape fairly and accurately depicts what it purports to show.

At the time your affiant entered the Erotica House Bookstore, Inc. on said date, he observed a Fort Wayne police officer purchase a magazine entitled "Cock Biter" and an additional magazine entitled "Ass Attack". In addition, your affiant observed one Nancy S. Johnson, an employee of said establishment, sell a magazine to an undercover vice officer, said magazine was entitled "Dick, Tit, Ass-Fucker". That your affiant has reviewed the chain of custody of all three magazines, placed his initials in each of said magazines for later identification. That he has brought with him to this Honorable Court said three magazines intact from the Vice Division custody and marked same as State's Exhibit "78, 79 and 80" inclusive.

17. That on or about the 16th day of March, 1984, your affiant observed vice officers of the Fort Wayne Police Department purchase two magazines in the normal course of business from that certain enterprise known as Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana. Said magazines were entitled "Anal Thrust" and "Anal Virgin". Your affiant marked same with his initials for later identification. That the chain of custody has been preserved on same and he has brought those magazines with him for review by this Court as State's Exhibit "81 and 82" respectively.

18. That it is the belief of your affiant that all of the magazines purchased and alluded to heretofore in this affidavit are obscene and constitute a violation of Indiana Code, that is "Distribution of Obscene Matter for Consideration", inasmuch as it is the opinion of your affiant, after having reviewed all of said magazines, that they depict individually sexual activity without any restrictions which the average person applying contemporary community standards would find that the dominant theme of said alleged matters, taken as a whole, appeal to the prurient interest in sex; and that said matters depict in a patently offensive way sexual conduct; and that each magazine individually, taken as a whole, lacks serious literary, artistic, political, or scientific value.

19. That your affiant personally examined that certain establishment known as Fort Wayne Books, Inc., and Cinema Blue of Fort Wayne, Inc. on this the 19th day of March, 1984. That he has found from his visit

on this day, and the observation of a film at each of said establishments, that the basic nature of their business has remained the same as he has observed it from time to time from June 8, 1981, to present.

20. That your affiant has on this the 19th day of March, 1984, personally visited the Erotica House Bookstore, Inc. and has observed the said premises and has observed the purchase of a certain magazine entitled "____ ____ ____ ____ ____" That from the personal observations of this establishment it is the opinion and belief of your affiant that the basic nature of said establishment's business has remained unaltered from June 8, 1981, up to and including the present time. Your affiant has caused his initials to be placed in the magazine which was purchased on this the 19th March, 1984, and has kept said magazine in his visual observation from the time of its purchase until entering this Honorable Court. In reviewing said magazine, it is the belief of your affiant that said magazine constitutes a "distribution of obscene matter for consideration" in that it depicts sexual activity without any restrictions which the average person applying contemporary community standards must find that the dominant theme of such alleged material, taken as a whole, appeals to the prurient interest in sex; and that said matter depicts in a patently offensive way sexual conduct; that the matter taken as a whole lacks serious literary, artistic, political or scientific value. That said magazine has been marked for identification purposes as State's Exhibit "83".

21. That the source of the information which your affiant has related hereinabove in this affidavit is his

direct observation of these places of business from June 8, 1981, up to and including the present day, his direct review of court records, police files, and information gathered by his fellow officers pursuant to a joint investigation in which he has taken an active and uninterrupted part from June 8, 1981 to the present time.

Further your affiant sayeth naught.

/s/ Charles Dennis. Affiant

STATE OF INDIANA)
) SS:
COUNTY OF ALLEN)

Subscribed and sworn to before me this 19th day of March, 1984.

/s/ Gloria E. Trueblood, Notary Public
Resident of Allen County, Indiana

My Commission Expires:
August 30, 1987.

(Exhibits omitted in printing.)

IN THE ALLEN CIRCUIT COURT

CAUSE NO. 84-446

STATE OF INDIANA)
) ss:
COUNTY OF ALLEN)

STATE OF INDIANA AND STEPHEN M. SIMS, PROSECUTING ATTORNEY FOR THIRTY-EIGHTH JUDICIAL CIRCUIT,
Plaintiff,

vs.

FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., EROTICA HOUSE BOOKSTORE, INC., MR. DONALD KRONTZ; MR. DONALD KRONTZ IN HIS CAPACITY AS MANAGER OF FORT WAYNE BOOKS, INC., MANAGER OF CINEMA BLUE OF FORT WAYNE, INC.; MANAGER OF EROTICA HOUSE BOOKSTORE, INC.; MR. DONALD KRONTZ IN HIS CAPACITY AS A MEMBER OF THE BOARD OF DIRECTORS OF FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC. EROTICA HOUSE BOOKSTORE, INC.; MARK A. BROOKS, THE GROUP d/b/a EUROPEAN INVESTMENTS N V, THE GROUP d/b/a THEATRE A CORPORATION, NANCY S. JOHNSON, CYRUS B. COOPER,
Defendants.

ORDER

(Filed March 19, 1984)

Comes now the Prosecuting Attorney of the 38th Judicial Circuit, Stephen M. Sims, and files his Complaint For Injunctive Relief From Corrupt Business Influence and Action For Forfeiture of Property Incident to Corrupt Business Influence pursuant to Indiana Code 34-4-30.5-2 and Indiana Code 34-4-30.5-3 (a) and comes now the Prosecuting Attorney and files his Petition for Seizure of Property Incident to Corrupt Business Influence pursuant to Indiana Code 34-4-30.5-3 and submits therewith a "Probable Cause Affidavit" as part thereof, which are in the following words and figures:

(H. I.)

And the Court having examined said petitions and probable cause affidavit and having heard evidence on same NOW FINDS THAT:

1. That said petitions and probable cause affidavit comply with requirements of Indiana Code 34-4-30.5-2 and Indiana Code 34-4-30.5-3;

2. That the Court having reviewed said petitions and probable cause affidavit and having heard evidence on same finds pursuant to Indiana Code 34-4-30.5-3 and Indiana Code 34-4-30.5-2;

a) That the Prosecuting Attorney for the 38th Judicial Circuit has filed an action for forfeiture of any property used in the course of, intended for the use in the course of, derived from or realized through conduct in violation of Indiana Code 35-45—6-2;

b) That said action was brought in the Allen Circuit Court, which has proper jurisdiction of same;

c) That the Prosecutor has properly filed a petition for property "subject to forfeiture" to be seized by a law enforcement agency, and has simultaneously filed a proper probable cause affidavit;

d) That the probable cause affidavit submitted with said petition for seizure of "property subject to forfeiture" does in and of itself establish probable cause and the Court now finds that there is probable cause that Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., Erotica House Bookstore, Inc., and the other defendants, have formed an enterprise that is and has violated Indiana Code 35-45-6-2 and that said defendants have used the following specific real property, the buildings thereon and all of the contents of said buildings for actual use in the course of, or intended use in the course of, or that same have been derived from, or realized through, conduct in violation of Indiana Code 35-45-6-2:

i) Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, together with the building and all of the contents of said building;

ii) Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, together with the building and all of the contents of said building;

iii) Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, together with the building and all of the contents of said building.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The Sheriff of Allen County is ordered to seize that property "subject to forfeiture" which is commonly known as:

a) Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, together with the building thereon and all of the contents of said building, real or personal;

b) Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, together with the building thereon and all of the contents of said building, real or personal;

c) Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, together with the building thereon and all of the contents of said building, real or personal;

2. That pursuant to Indiana Code 34-4-30.5-4 (b), the Sheriff of Allen County is directed to make such seizure immediately upon receipt of this Order and may make such seizure in one or more of the following manners:

a) Place the property under seal;

b) Remove the property or any part thereof to a place designated by the Court; or

c) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

3. The Sheriff of Allen County is specifically authorized to use officers under his command to effectuate this Order as well as any Fort Wayne police officers allowed to him by the Fort Wayne Police Department;

4. The defendants, Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc., are ordered by this Court to avoid removing any liquid assets now in the State of Indiana from the State of Indiana, or from dissipating any bank accounts or secreting same until further order of this Court.

ALL OF WHICH IS ORDERED THIS 19TH DAY OF MARCH, 1984.

/s/ Thomas L. Ryan
Judge, Allen Circuit Court

IN THE ALLEN CIRCUIT COURT

CAUSE NO. CC-84-446

(Title omitted in printing.)

REQUEST FOR EXTENSION OF TIME

(Filed April 16, 1984)

The Defendants, DONALD KRONTZ, MARK A. BROOKS, and NANCY S. JOHNSON, by counsel, respectfully request an extension of time to respond to the Plaintiffs' Complaint, for the reason that the undersigned counsel needs additional time in which to investigate the facts of the matter for the purpose of forming an intelligent and proper response to the Complaint filed on March 19, 1984.

WHEREFORE, said Defendants, DONALD KRONTZ, MARK A. BROOKS, and NANCY S. JOHNSON, by counsel, respectfully move for an extension of time of 30 days within which to respond to the Complaint to and including May 16, 1984.

LEBAMOFF LAW OFFICES

By: /s/ Kenneth R. Scheibenberger
Kenneth R. Scheibenberger
918 South Calhoun Street
Fort Wayne, IN 46802
Telephone: 219/423-2581

ATTORNEYS FOR DEFENDANTS,
DONALD KRONTZ, MARK A. BROOKS,
and NANCY S. JOHNSON.

IN THE ALLEN CIRCUIT COURT

CAUSE NO. CC-84-446

STATE OF INDIANA)
) SS:
COUNTY OF ALLEN)

STATE OF INDIANA AND STEPHEN M. SIMS, PROSECUTING ATTORNEY FOR THIRTY-EIGHTH JUDICIAL CIRCUIT,
Plaintiff,

vs.

FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., EROTICA HOUSE BOOKSTORE, INC., MR. DONALD KRONTZ; MR. DONALD KRONTZ IN HIS CAPACITY AS MANAGER OF FORT WAYNE BOOKS, INC., MANAGER OF CINEMA BLUE OF FORT WAYNE, INC.; MANAGER OF EROTICA HOUSE BOOKSTORE, INC.; MR. DONALD KRONTZ IN HIS CAPACITY AS A MEMBER OF THE BOARD OF DIRECTORS OF FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., EROTICA HOUSE BOOKSTORE, INC.; MARK A BROOKS, THE GROUP d/b/a EUROPEAN INVESTMENTS N V, THE GROUP d/b/a THEATRE A CORPORATION, NANCY S. JOHNSON, CYRUS B. COOPER,
Defendants.

ORDER

BE IT FURTHER REMEMBERED that afterwards, to-wit: on the 18th day of April, 1984, the following proceedings were had in the above entitled action before the Honorable Judge aforesaid, to-wit:

• • •

The Court, being duly advised in the premises now makes and enters the following finding, ruling, orders and judgment thereon, namely:

Court considers and DENIES in their entirety Defendants', Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc.:

1. Motion for Stay Pending Appeal filed April 3, 1984.

2. The Assignment of Error and;

3. Motion for Stay Pending Appeal filed April 12, 1984.

COURT GRANTS:

1. The Petition to Certify filed April 3, 1984 and the Supplemental Petition to *Crtify* filed April 12, 1984.

• • •

The Court files its written order of certification pursuant to App. Rule 4(B)(6).

IN THE
COURT OF APPEALS OF INDIANA
FOURTH DISTRICT

NO. 4-1283-A-415

(Title omitted in printing.)

REQUEST FOR EXPEDITIOUS RULING ON MOTION FOR STAY (MODIFICATION) FILED APRIL 27, 1984

TO: The Chief Judge of the Court of Appeals and the Associate Judges:

COME NOW Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotic House Bookstore, Inc., defendants-appellants (hereinafter "Movants") in Case No. 3-484-A-106, consolidated with Case No. 4-1283-A-415 under the latter number by this Honorable Court on May 2, 1984, and respectfully move this Honorable Court to rule expeditiously on Movants' Motion for Stay (Modification) heretofore filed on April 27, 1984. In support of this Motion for Expeditious Ruling, Movants respectfully allege the following:

1. On or about March 19, 1983, plaintiff-appellee Stephen Sims, District Attorney for the Thirty-Eighth Judicial Circuit, and those in active concert with him, pursuant to the purported authority of orders issued by the Honorable Thomas L. Ryan, Judge of the Allen Circuit Court, sequestered all of the contents of Movants' bookstores and theaters. The said contents seized under provisions of the Indiana State Civil RICO statute, included tens of thousands of books, magazines and films as well as neutral mechanical items such as projectors, cash registers, and bookracks. Movants' locations were also sealed

at and from the time of sequestration with access to them denied to Movants' employees and the general public. Movants' businesses were and have been completely closed. The sole bases for the Civil RICO allegations were alleged violations of the state obscenity laws, some of which had resulted in final criminal convictions.

2. Movants promptly sought relief in the court below, all of which was sequentially denied; the last of such denials was on April 18, 1984.

3. Thereafter, Movant perfected an interlocutory appeal and prepared a Motion for Stay (Modification) pending appeal and filed said pleadings in this Honorable Court on April 27, 1984.

4. On May 2, 1984, plaintiff-appellee Sims, through counsel, filed a Verified Petition for Transfer of Case to the Supreme Court of Indiana in connection with the Fort Wayne matter (Case No. 3-484-A-106). On May 4, 1984, this Honorable Court *sua sponte,* issued an order consolidating the Fort Wayne case with a similar case, *4447 Corporation, World Wide Video Systems, Issi Theatre Corporation, Plaza Entertainment Center and Burton Gorelick v. Stephen Goldsmith,* (case No. 4-1283-A-415) then and now pending in this Honorable Court. The cases were consolidated under the number of the latter case. The *4447 Corporation* litigation involved a similar use of the Indiana Civil RICO statutes to sequester and padlock a bookstore and had been extensively briefed in this Honorable Court. It also had been the subject of a special hearing on an appellant's Motion for Stay, resulting in the granting by this Honorable Court of the requested Stay on February 6, 1984.

5. Shortly after this Honorable Court's consolidation of the two appeals, counsel for plaintiffs-appellees in the consolidated cases (all plaintiffs-appellees were and are represented in this Honorable Court by Linley Pearson, Attorney General for the State of Indiana, by Thaddeus Perry, Deputy Attorney General) filed a Verified Petition for Transfer, of Case(s) to the Supreme Court of Indiana Apparently, the filing of said Petition(s) to Transfer automatically divests this Honorable Court of any jurisdiction over the subject litigation. Accordingly, this Honorable Court could not consider Movants' pending Motion for Stay (Modification), pending resolution of the Petition(s) to Transfer by the Honorable Supreme Court.

6. On July 17, 1984, the Honorable Supreme Court of the State of Indiana issued an Order denying plaintiff-appellees' Petition(s) for Transfer and remanding the causes to this Honorable Court for all purposes. The Honorable Supreme Court did not decide the Motion for Stay (Modification) which was before it during the pendency of the Petition(s) to Transfer, but instead, in its Order of July 17, 1984 denying the Petition(s) to Transfer, remanded it to this Honorable Court for decision.

7. As of the date of the instant motion, Movants' Motion for Stay (Modification) has not been decided. The affected bookstores and theaters have been closed for all purposes for nearly six months. Tens of thousands of unlitigated books, films and magazines have been seized and withheld from the public. Movants have suffered obvious business losses and are now facing loss of governmental licenses as a consequence of being closed (See, letter from Fort Wayne—Allen County Board of Public

Health, attached hereto as Exhibit A). Additionally, the First Amendment rights of both Movants and the public have been totally curtailed at the subject locations during this nearly six month period of *forced, ex parte,* (and presumably) *interim,* closure.

8. As of the date of the instant motion, plaintiff-appellees' have filed *no* opposition to Movants' Motion for Stay (Modification). The sole pleadings filed to date by plaintiff-appellees are the aforesaid Verified Petitions for Transfer [which addressed the merits of neither the Motion for Stay (Modification) nor the underlying interlocutory appeal] and a Brief of Appellees in conjunction with the appeal.

9. The said Brief of Appellees (filed in this Honorable Court on or about July 19, 1984) is silent with respect to Movants' Motion for Stay (Modification). It neither opposes the said motion nor discusses it an any other way. The brief (it is only four pages) Brief forthrightly states that

> "[T]he facts herein are almost identical with those of *4447 Corporation et al v. Goldsmith,* the other case with which this case has been consolidated." Brief of Appellees State of Indiana and Stephen Sims, page 2.

The Brief discusses two factual distinctions between Movants' case and the earlier case with which it has been consolidated, but concludes that

> " . . . these two consolidated cases are essentially the same . . . " *Ibid,* page 3.

Based on the stated essential similarity to the earlier filed consolidated case, appellees herein

> " . . . incorporate[d] by referenced those portions of the Brief . . . in *4447 Corporation v. Goldsmith,* filed

> in this Court on January 18, 1984, under Cause No. 1283A415 (sic) . . . . " *Ibid* page 3.

Thus, for all practical purposes, appellees have treated the two cases as legally identical, and, in fact, they are. The incorporated *Goldsmith* Brief neither opposed nor otherwise discussed the stay sought (and later granted) in that case.

10. The sole additional discussion in appellees' Brief herein focuses on their erroneous characterization of the subject of a recent Ninth Circuit decision, *J-R Distributors v. Eikenberry,* 725 F.2d 482 (9th Cir. 1984) as a

> " . . . nuisance abatement statute aimed at forestalling the repetition of objectionable conduct (i.e. dissemination of obscenity)." *Ibid* at page 3.

In fact, although the statute therein at issue was denominated a "moral nuisance" law, no injunctive provisions were either present or considered. The Court held unconstitutional a civil fine provision

> " . . . which is premised in part on profits 'attributable to the moral nuisance' [and which] may be based on profits from the *sale of protected materials* in a place that is a moral nuisance solely because obscene materials were also sold or exhibited there . . . . [The Court held] that it is impermissible in an anti-obscenity statute, to provide that the amount of a fine shall be based, even in part, on the proceeds from constitutuionally protected material." 725 F.2d at 494.

The Court's holding is, of course, apposite to the case at bar in that the enunciated constitutional doctrine bars the forfeiture of constitutionally protected materials or proceeds or assets derived from the sale of constitutionally protected materials regardless of the prior sale of unpro-

tected materials at the same or a related location. Appellees' entire premise in the case at bar is that all materials, items and assets used at a location at which two disseminations of obscene materials have occurred may be forfeited under the Indiana Civil RICO statute, along with the proceeds from *all* materials sold there. The Ninth Circuit's opinion in *J-R Distributors v. Eikenberry* specifically rejects appellees' theory as unconstitutional. Rehearing *en banc* in *J-R Distributors v. Eikenberry* was denied unanimously by the Ninth Circuit on July 5, 1984.

11. Given the failure of appellees herein to offer any opposition to Movants' Motion for Stay (Modification) in the nearly sixth months which have elapsed since its filing date, the finality of this Honorable Court's Order of February 6, 1984 granting a similar Motion for Stay in conjunction with the *4447 Corporation* matter (see paragraph 4, *supra*), and the conceded similarity of Movants' case and the *4447 Corporation* case, it is respectfully submitted that that Movants' pending Motion for Stay (Modification) should be decided expeditiously and granted.

12. Movants and their counsel well recognize the tremendous burdens facing this Honorable Court and other appellate courts in this the most litigious period in the history of our society. We recognize that the competing and frequently strident demands on the judiciary may frequently be nearly overwhelming. Nonetheless, given this Honorable Court's previously issued stay order, the long period of time which has elapsed since Movants' Motion for Stay (Modification) was filed, the irreparable injury suffered since March of 1984 by Movants' and the ongoing and severe harm to transcendent First Amendment concerns, we respectfully take this extraordinary step to re-

quest that this Honorable Court issue its Order modifying the Order of the Court below without further delay.

13. Counsel is, of course, available on short notice to participate in oral argument if such would be of assistance to this Honorable Court. To the extent that prior argument in conjunction with the previously issued Stay is deemed sufficient, then such would respectfully appear to substantiate the validity of Movants' request for the expeditious issuing of an Order granting their Motion for Stay (Modification) herein.

Respectfully submitted,

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By /s/ Franklin I. Miroff
Attorneys for Appellants

(Exhibit and Certificate of Service omitted in printing.)

IN THE
COURT OF APPEALS OF INDIANA

No. 4-1283-A-415

(Title omitted in printing.)

RESPONSE TO REQUEST FOR EXPEDITIOUS RULING ON MOTION FOR STAY

Come now the Appellees, State of Indiana and Stephen M. Sims, by their counsel, Linley E. Pearson, Attorney General of Indiana, by his Deputy, Arthur Thaddeus Perry, and in response to Appellants' Request for Expeditious Ruling on Motion for Stay, states as follows:

1. This case is already fully briefed.

2. Since one of the conditions for a stay is likelihood of success on the merits, the Court would have to consider the merits in any event.

3. Judicial efficiency would best be served, therefore, by proceeding to the case itself.

4. Appellees' Brief makes clear that Appellants cannot prevail on the merits of this case.

5. A stay should therefore be denied.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

By: /s/ Arthur Thaddeus Perry
Deputy Attorney General

Attorneys for Appellees

(Certificate of Service omitted in printing.)

IN THE
COURT OF APPEALS OF INDIANA
FOURTH DISTRICT

FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., and EROTICA HOUSE BOOK-STORE, INC.,	)	
Appellants,	)	CAUSE NO. 4-1283-A-415
vs.	)	
STATE OF INDIANA and STEPHEN M. SIMS, Prosecuting Attorney for the THIRTY EIGHTH JUDICIAL CIRCUIT,	)	(Filed April 4, 1985)
Appellees.	)	

ORDER

The Appellants, having heretofore filed herein their Motion for Stay (Modification) of Interlocutory Injunction Without Bond Pending Appeal; and thereafter, this case and another case known as 4447 Corporation, et al. v. Stephen Goldsmith, et al., which presented common questions of law were consolidated; and a stay in the 4447 Corporation similar to the stay requested in this case was granted; and thereafter the Appellees filed a Verified Petition for Transfer of the consolidated cases to the Supreme Court of Indiana, where the consolidated cases pended until the Supreme Court denied the appellees' Petition for Transfer and remanded the consolidated cases to this

Court; as a result of the denial of transfer, the stay in the 4447 Corporation case remains in effect pending the appeal or the further order of this Court; thereafter the Appellants renewed their previously filed Motion for Stay, and now the Court, being duly advised, taking judicial notice of its own records in this case and particularly of the Order of Stay heretofore issued in the 4447 Corporation case, now finds that the Appellants' Motion for Stay in the above-captioned case should be granted, Conover, J., dissenting.

IT IS THEREFORE ORDERED that the Order heretofore entered by the Allen Circuit Court, the Honorable Thomas L. Ryan, Judge, presiding, in Cause Number CC84-446 of said Court, dated March 19, 1984, is hereby modified and ordered to conform with the stay heretofore made and entered in the 4447 Corporation case, pending the further order of this Court, in the following respects:

A. That the Sheriff of Allen County and/or the Fort Wayne Police Department shall forthwith unlock, unseal and release all property within the commercial building at 227 Pearl Street, Fort Wayne, Allen County, Indiana, 2441 Broadway, Fort Wayne, Allen County Indiana and 930 Broadway, Fort Wayne, Allen County Indiana, which property had heretofore been locked, sealed and secured pursuant to the Order of the Allen County Circuit Court, filed March 19, 1984 and in accordance therewith, shall forthwith return all the personal property removed from the above-specified commercial buildings on March 30, 1984, as more fully set out in the inventory filed with the Allen Circuit Court on April 4, 1984; and

B. Defendants shall preserve all property at 227 Pearl Street, Fort Wayne, Allen County, Indiana, 2441 Broadway, Fort Wayne, Allen County, Indiana and 930 Broadway, Fort Wayne, Allen County, Indiana, until further order of this Court; defendants shall not transfer or remove from said building any fixtures, cabinets, cameras, audio or video equipment, cash registers or other property until further order of this court. This paragraph shall not prevent defendants at 227 Pearl Street, Fort Wayne, Allen County, 2441 Broadway, Fort Wayne, Allen County, Indiana and 930 Broadway, Fort Wayne, Allen County, Indiana from exhibiting, transferring or selling books, magazines, newspapers, motion picture films or videotapes. However, until further order of this court, all other property shall be held by the defendants.

A written opinion on the merits of the appeal will imminently follow this order.

ORDERED this 4th day of April, 1985.

/s/ Paul H. Buchanan, Jr.
CHIEF JUDGE

INDIANA COURT OF APPEALS

Cause No. 4-1283-A-415

Opinion, *4447 Corporation, et al. v. Goldsmith*
(Printed as Appendix C to
Certiorari Petition, Cert. App. 28-98.)

INDIANA SUPREME COURT
Cause No. 29S04-8703-CV-270

Opinion, *4447 Corporation, et al. v. Goldsmith*
(Printed as Appendix A to
Certiorari Petition, Cert. App. 1-19.)

Denial of Rehearing, *4447 Corporation, et al. v. Goldsmith*
(Printed as Appendix E to
Certiorari Petition, Cert. App. 105-112.)

GOLDSMITH v. 4447 CORPORATION, et al.

RELEVANT DOCKET ENTRIES

Date of Filing	MARION CIRCUIT COURT
8/ 1/83	[Complaint] Comes now the plaintiff and files verified petition for seizure of property subject to forfeiture.
	[Court upon *ex parte* hearing issues] findings of fact and order [for seizure of property].
8/ 4/83	Come now defendants by counsel and file motion to dismiss, memo of law in support of motion to dismiss, motion to strike and/or expunge *ex parte* order of seizure, . . . motion to continue, motion for change of venue.
	Comes now plaintiff and files verified petition for seizure of property subject to forfeiture. Motion for change of venue granted.
8/18/83	Venue to Hamilton County.
	HAMILTON CIRCUIT COURT
9/ 8/83	Comes now the Plaintiff, by counsel, and files Amended Complaint.
9/12/83	Come now defendants, 4447 Corporation, et al., and file Motion To Vacate Order Filed August 1, 1983 and Memorandum Of Law In Support Of Motion.
9/13/83	Comes now the Defendant, 4447 Corporation, and files Motion To Continue [Deposition].
9/29/83	Motion to Modify Order filed August 1, 1983 Pending Disposition of Motion To Vacate.
10/ 5/83	Comes now plaintiff by counsel, and files its Motion for Continuance of hearing [of Defendants' Motion To Vacate Seizure Order].

10/ 7/83	Plaintiff's Motion for Continuance granted.
10/25/83	Comes now the defendant, 4266 W. 38th Street, Corporation, by counsel, and files its Renewed Motion To Modify Order Filed August 1, 1983, Objection To Continuance Of Hearing Date And Opposition To Motion To Strike.
10/28/83	Comes now the plaintiff, by counsel, and files Memorandum Of Law In Opposition To Motion To Dismiss And To Motion To Vacate Court's [Seizure] Order.
11/15/83	Defendant's Reply Memorandum in Support of Motion To Dismiss Complaint And Motion to Vacate [Seizure] Order.
11/21/83	Court having taken under advisement matters in November 18, 1983 hearing now enters Order [denying motions to dismiss and to vacate seizure order].
12/ 1/83	Comes now the defendant, Burke H. Mendenhall, by counsel, and files his Trial Rule 12(B)(6) and 12(E) Motion to Dismiss Complaint.
12/ 5/83	Motion for Stay Pending Appeal filed by Corporate Defendants and Burton Gorelick, is hereby denied.
12/15/83	Motion to Dismiss
2/ 3/84	Court of Appeals decision filed [granting stay of seizure pending appeal].
8/20/84	Come now defendants, by counsel, and file Jury Demand.
8/22/84	Defendants' Demand for Trial by Jury is hereby denied.
8/29/84	Plaintiff by counsel files Answer of Defendant Burke H. Mendenhall and Mendenhall's Motion for Separate Trial.
9/14/84	Comes now the plaintiff, and files Answer In Opposition To Motion For Separate Trial.

9/24/84 Motion for Separate Trials filed by Defendant, B. Mendenhall, is denied.

1/30/85 Come now 4447 Corporation, World Video Systems, ISSI Theatre Corporation, Plaza Entertainment Center and Burton Gorelick, by counsel and file Motion to Vacate Trial Setting and to Defer Further Proceedings Pending Finality of Interlocutory Appeal.

2/ 7/85 Defendant's Motion to Vacate Trial Setting and to Defer further proceedings is hereby denied.

2/25/85 Comes now the Court of Appeals and issues the enclosed order [for stay of proceedings pending appeal].

2/26/85 Motion for Continuance granted as per Order. Cause to be reset at a later date when Stay Ordered by Indiana Court of Appeals is lifted.

[6/12/85] [Opinion of Court of Appeals filed.]

3/ 3/87 Opinion from [Indiana] Supreme Court filed.

IN THE CIRCUIT COURT OF MARION COUNTY
CAUSE NO. C83 1788

STATE OF INDIANA)
) ss.
COUNTY OF MARION)

STEPHEN GOLDSMITH, PROSECUTING ATTORNEY FOR NINETEENTH JUDICIAL CIRCUIT,

Plaintiff,

vs.

4447 CORPORATION, WORLD VIDEO SYSTEMS, INC. ISSI THEATRE INC., BURTON GORELICK d/b/a ADULT TOY AND GIFT, DISK DEVELOPMENT, BURKE MENDENHALL, IVAN CHALFIE, HENRY KAHN, BARBARA BYRNES, HERBERT ALLEN, JAMES LEWELLYN, ROGER SUMMERS, EUGENE YARMY, GEORGIA MYERS, HERB TROUT, PLAZA ENTERTAINMENT CENTER, CYNTHIA SMITH, LAURIE JACOBS, WILLIAM E. LONG, ROBERT BEAMAN,

Defendants,

(Filed CC Aug. 1, 1983)

Bernard J. Gohmann, Jr., Clerk

COMPLAINT

1. Stephen Goldsmith, as Prosecuting Attorney for the Nineteenth Judicial Circuit of Indiana, brings this civil action for injunctive and other relief, under the Indiana Racketeer Influence and Corrupt Organization Statute ("R.I.C.O" Action) 35-45-30.5-1, et. seq. Indiana Code (1982), alleging as follows:

Jurisdiction

2. Jurisdiction of this matter is conferred upon this Court by I. C. 34-4-30.5-2.

Statutory Authority

3. The statutory authority relied upon by Plaintiff in this case is the Racketeer Influenced and Corrupt Organizations Act (R.I.C.O.) I. C. 35-45-6-1 - 35-45-6-2, Indiana Code, 1982 and Civil Procedure Code Special Proceedings Civil Remedies for Racketerring Activity I.C. 34-4-30.5-1 - 34-4.30.5-6.

Parties

4. Plaintiff, Stephen Goldsmith, is the duly elected Prosecuting Attorney for the Nineteenth Judicial Circuit of Indiana. The Prosecuting Attorney is authorized to bring this action by I. C. 34-4-30.5-2.

5. The defendants, 4447 Corporation d/b/a World Video Systems, Inc., is a retail video store located at 4447 North Keystone Avenue, Indianapolis, Marion County, Indiana. The defendant, 4447 Corporation, is an Indiana Corporation and said corporation was incorporated on April 22, 1983.

6. The defendant, World Video Systems, Inc. is an Indiana Corporation located at 680[illegible] East 38th Street, Indianapolis, Marion County, Indiana.

7. The defendant, I.S.S.I. Theatre, Inc. d/b/a Adult Toy and Gift, is a retail video store and bookstore located at 6755 East 38th Street, Indianapolis, Marion County, Indiana. The defendant, I.S.S.I. Theatre, Inc. is a Delaware corporation, and said corporation was admitted to do business in the State of Indiana on June 5, 1978.

8. The defendant, 4447 Corporation, d/b/a World Video Systems, Inc. operates at 4447 North Keystone Avenue in Marion County, Indiana and I.S.S.I. Theatre, Inc. d/b/a Adult Toy and Gift at 6755 East 38th Street in Marion County, Indiana, for the purpose of selling, distributing or showing or offering to sell, distribute or show, or have in its possession, custody or control with intent to sell, distribute, show or advertise in any manner, obscene, lewd, lascivious, filthy, indecent, sadistic or masochistic books, magazines, periodicals, newspapers, photographs, motion picture films, or articles or instruments of indecent use or purpose; Said corporations knowingly write, print, publish or utter, or cause to be written, printed, published, or uttered, advertisements or notices of various kinds, giving information, directly or indirectly, stating or purporting to state, where or whom, or by what means any,

or what purports to be any, such material, matter, article, or thing of any such character, can be purchased, obtained, or had. Said corporations in any manner knowingly hires, employs, uses or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above.

9. The defendants, Ivan M. Chalfie and Henry Kahn d/b/a Disk Development Company, are a real estate firm located at 9566 Allisonville Road, Indianapolis, Marion County, Indiana. The defendant, Disk Development Company, owns the real estate at 4447 North Keystone, the location of the defendant, 4447 Corporation d/b/a World Video Systems, Inc. retail video store.

10. The defendant, Burton Gorelick, is a resident of the State of Michigan. The defendant, Burton Gorelick, is the real property owner of the lots at 6755 E. 38th Street, Indianapolis, Marion County, Indiana, the location of defendant, I.S.S.I. Theatre, Inc. d/b/a Adult Toy and Gift.

11. The defendant, Burke Mendenhall, is a resident of the State of Indiana. The defendant, Burke Mendenhall is the real property owner of 4276 W. 28th Street, the location of defendant, Plaza Entertainment Center.

12. The defendants, Cynthia Smith, Laurie Jacobs, William E. Long and Robert Beaman, are all residents of the State of Indiana. All of the defendants named above were, at all times relevant herein, either employed by or associated with an enterprise, and all of the above-named defendants did conduct or participate directly or indirectly , in such enterprise through a pattern of racketeering activity as is more fully set forth herein.

The Burton Gorelick Enterprise

13. Plaintiff, Stephen Goldsmith, Prosecuting Attorney for the Nineteenth Judicial Circuit of Indiana, brings this lawsuit pursuant to I. C. 34-4-30.5, alleging that Burton Gorelick and all of the individual and corporate defendants named above did form an illegal enterprise, consisting of all of the above-named persons, whose funtions in said enterprise include ownership, operation, management or employment by the corporations named herein.

14. The purpose of this enterprise is alleged to be, by Plaintiff, to operate in Marion County, Indiana "adult bookstores", which bookstores operate for the purpose of selling, distributing, or showing, or offering to sell, distribute or show, or have in its possession, custody or control with intent to sell, distribute, show or advertise in any manner, obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic books, magazines, periodicals, newspapers, photographs, motion picture films, or articles or instruments of indecent use or purpose.

15. Said enterprise knowingly writes, prints, publishes or utters or causes to be written, printed, published or uttered advertisements or notices, giving information directly or indirectly, stating, or purporting to state, where, how, or whom or by what means any or what purpose to be any, such material, matter, article, or thing of any such character can be purposed, obtained or had.

16. Said enterprise knowingly hires, employs, uses or permits persons to do or assist in doing either knowingly or innocently, acts in violation of I. C. 34-4-30.5-2 and I. C. 35-45-6-2(3).

17. In addition to the above, said enterprise, by and through its corporations, owners, managers, and employ-

ees, distributes obscene materials on a daily basis, knowing the obscene nature thereof, in that said enterprise, by and through its corporations, owners, managers, and employees, sells, exhibits, or otherwise disseminates to other persons, obscene material or said enterprise offers to do so on said enterprise possesses such material with intent to do so in violation of I. C. 34-4-30.5-2 and 35-45-6-2-(3).

Facts and R. I. C. O. Violations

18. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 14 above and further alleges and follows:

19. Beginning on or about June 5, 1978 and continuing up to, and including, August 1, 1983, and at diverse times and between said dates, all the above-named defendants were employed by or associated with, The Gorelick Enterprise, and all the above named defendants did conduct or participate, directly or indirectly, in said enterprise, through a pattern of racketeering activity as is more fully set forth below, to-with:

a. All of the above-named defendants did engage in at least two incidents of racketeering conduct in that each defendant did at least twice between said dates, knowingly sell, distribute or show or offer to sell, distribute or show, or have in its or his possession, custody or control with intent to sell, distribute, show or advertise in any manner, obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic books, magazines, periodicals, newspapers, photographs, motion picture films, or articles or instruments of indecent use or purpose;

b. said defendants did knowingly, between the above-referenced dates, write, print, publish or utter, or cause to be written, printed, published or uttered, advertisements or notices, giving information which stated or purported to state, where, how, of whom, or by what means any, what purported to be any such material, matter, article, or thing of any such character could be purchased, obtained, or had;

c. said defendants did knowingly between the above-referenced dates, hire, employ, use or permit any person to do or assist in doing, either knowingly or innocently, the acts or things mentioned above with each separate incident set forth above being in violation of I. C. 35-30-10.1-2.

d. each separate incident set forth above constitutes a violation of I. C. 35-30-10.1-2, and any two such incidents set forth above in addition to any one of the incidents set forth previously constitutes violations of I. C. 35-45-6-2 (a)(3).

e. All of the above-named defendants did, between the above-referenced dates, own, operate, manage, maintain employment with, The Gorelick Enterprise, and more specifically, each of the above-named defendants were, and/or, are employed by, or associated with the Gorelick Enterprise, as defined and identified herein.

f. All of the above-named defendants did conduct or participate, directly or indirectly, in The Gorelick Enterprise as set forth above through a pattern of racketeering activity in violation of I. C. 35-45-6-2(a)(3) in that they engaged in two or more incidents of said racketeering conduct which had the same or similar intents, results,

accomplices, victims, methods or commission or other interrelated incidents of the same kind each.

g. Further, the defendants, 4447 Corporation d/b/a World Video Systems, Inc., I.S.S.I. Theatre Corp. d/b/a Adult Toy and Gift, and Burton Gorelick did, in violation of I. C. 35-30-10.1-1 and I. C. 35-30-10.1-2 and I. C.. 35-45-6-2(a)(3) in any manner, knowingly hire, employ, use or permit any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, more specifically the defendants named in this paragraph did knowingly hire, employ, use or permit Barbara Byrnes, Herbert Allen, James Lewellyn, Roger Summers, Eugene Yarmy, Georgia Meyers, Herb Trout, Cindy Smith, Laurie Jacobs, William E. Long, Robert Beaman, and other persons whose identities are unknown to the plaintiff at this time to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, with each such incident being in violation of I. C. 35-30-10.1-2. Any two such incidents set forth in this paragraph or with any one of such incidents set forth in this paragraph, in addition to any one of the incidents set forth in any other paragraph in this allegation, constitute violation of I. C. 35-45-6-2(a)(3).

Further, plaintiff alleges that all of the above acts or incidents did take place in Marion County, Indiana.

20. Based upon the above, and the information provided by the agents of the Indianapolis Police Department who have been conducting the investigation of The Gorelick Enterprise, plaintiff believes that The Gorlick Enterprise will continue to operate in violation of R.I.C.O. statutes, unless the below sought relief is granted.

WHEREFORE, because defendants have conducted or participated in an enterprise through a pattern of racketeering activity in violation of I. C. 35-45-6, and upon information and belief, will continue to engage in such activities unless substantial penalties are imposed by this Court, plaintiff respectfully requests that this Court grant the following relief:

1. Pursuant to I. C. 34-4-30.5(2) immediately enjoin defendants and their agents, employees, representatives or assigns from further violations of I. C. 35-45-6-2(a)(3) and I. C. 35-30-10.1-2.

2. Order defendants to immediately list and state the location of all property, real and personal, including money, that defendants own or have title to or any right, interest or equity in;

3. Immediately subject all personal and real properties, money, intangibles, and corporate interest and activities acquired or maintained in violation of the R.I.C.O. Act to Court supervision, and order defendants to refrain from disposing of, transferring, relocating, dissipating, or otherwise altering the status of said properties or corporate entities without prior approval of the Court.

4. Pursuant to I. C. 34-4-30.5-2(1) order all defendants to divest themselves of any interest in any and all enterprise, including real property.

5. Pursuant to I. C. 34-4-30.5-3(a) order forfeiture of all property and other things of value, real or personal, including money, used in the course of, intended for us in the course of, derived from or realized through conduct in violation of I. C. 35-45-6-2.

6. Pursuant to I. C. 34-4-30.5-2(4) order the suspension or revocation of a license, permit, or prior approval granted to defendants by any agency of the State.

7. Pursuant to I. C. 34-4-30.2(5) order the forfeiture of the charter of those defendant corporations organized under the laws of the State of Indiana or where appropriate, revocation of the certificates authorizing a foreign corporation to conduct business within the state.

8. Pursuant to I. C. 35-45-6 permanently enjoin defendants and their agents, employees, representatives or assigns from engaging in the activities described herein that are shown to violate I. C. 35-46-6 and I. C. 34-4-30.5.

9. Pursuant to I. C. 34-4-30.5-3 order institution or forfeiture proceedings for all property, real or personal, including money, used in the course of, derived from, or realized through, conduct in violation of I. C. 35-45-62(3).

Plaintiff asks that this Court immediately sequester and subject to Court supervision all bank accounts held by the individual and corporate defendants herein, and supervise the sale, transfer, or the dispositions of any real or personal properties by said defendants, and for all other just and proper relief in the premises.

/s/ J. Gregory Garrison
Deputy Prosecuting Attorney for the
Nineteenth Judicial Circuit

/s/ Philip R. Blowers
Deputy Prosecuting Attorney for the
Nineteenth Judicial Circuit

(Certificate of Service Omitted in Printing.)

IN THE CIRCUIT COURT OF MARION COUNTY

CAUSE NO. C83 1788

(Title omitted in printing)

(Filed CC Aug. 1, 1983)

Bernard J. Gohmann, Jr., Clerk

VERIFIED PETITION FOR SEIURE OF PROPERTY SUBJECT TO FORFEITURE

Comes now the plaintiff, in person and by counsel, and petitions the Court for seizure of property pursuant to statute, and in support of said petition would show the Court as follows:

1. He is the duly elected and serving Prosecutor for the Nineteenth Judicial Circuit, including Marion County, Indiana.

2. That he is the plaintiff in the above-entitled cause.

3. The plaintiff hereby incorporates by reference thereto, all of the allegations set forth in the Complaint of the plaintiff, as filed in this cause on the 1st day of August, 1983.

4. The plaintiff believes and has good cause to believe that the defendants, and each of them, by and through the corrupt enterprise defined and identified in the Complaint, possess, with intent to distribute, and in fact, distribute, various obscene materials as more completely identified in said Complaint. Said materials are obscene because and for the reason that they explicitly depict acts of sexual contact between members of the same and opposite sexes, including oral, anal and genital contact. Plain-

tiff believes and has good cause to believe that said materials are obscene as defined by the statutes of the State of Indiana for the reason that they are patently offensive, intended and calculated to appeal to a prurient interest, and are without significant literary, artistic, social, scientific or educational value. The plaintiff has extensive knowledge of a continuing and on-going investigation by agents for the Indianapolis Police Department of the racketeering activity described in the Complaint of the plaintiff. Evidence discovered in that investigation was a product of investigation by Detective Sgt. Thomas R. Rodgers, Detective Sgt. assigned to the Vice Branch, Indianapolis Police Department. The Affidavit of Sgt. Rodgers is attached hereto, made a part hereof, and marked as Plaintiff's Exhibit A.

5. The affidavit of Sgt. Rodgers, Exhibit A herein, establishes probable cause to believe that a violation of the Criminal Racketeering Influenced Criminal Organizations Statute, I. C. 35-45-6-2, has occurred, involving property located at 4276 West 38th Street, Indianapolis, Indiana. The defendant, 4447 Corporation, doing business as Plaza Entertainment Center, has constructed a facility in furtherance of the racketeering activity described in the Complaint of the plaintiff, at 4276 West 38th Street, doing business under the name and style of Plaza Entertainment Center. Said facility is constructed for the purposes of and calculated for the use in said racketeering activity, being the continued dissemination of obscene material. (Affidavit of Rodgers, Exhibit A). As of the date of the sig[illegible] of this petition, said facility has been prepared for o[illegible] and agents for the defendants have stated to [illegible]tive Rodgers by and through his investigators, that

sa'd facility shall be open for business August 1, 1983. The premises located at 4276 West 38th Street contain numerous and multiple items of an obscene nature, possessed by the defendants named in the above entitled action with the intent to distribute those in furtherance of their continuing criminal activity as identified in said Complaint. The possession of such articles as are described herein, including those described in the affidavit of Sgt. Rodgers, constitute a probable cause showing that a violation of the Racketeering Statutes as set forth herein have occurred and are continuing to occur.

Pursuant to I. C. 34-4-30.5-3 (b) the Court is required to issue an Order, upon such probable cause showing, ordering appropriate law enforcement agencies to seize the property contained in the location described above, 4276 W. 38th Street. The Court may either order seizure by requiring law enforcement agencies, the agency of Indianapolis Police Department, to take possession of all merchandise and materials found therein, or, as provided in 34-4-30.5-4(b)(1) by placing said property under seal.

WHEREFORE, the plaintiff prays that the Court will enter and issue an Order authorizing and directing the appropriate agencies for the Indianapolis Police Department to seize all property contained in and around the premises located at 4276 W. 38th Street, to place the same under seal, to cause the same to be locked, and to deny admittance to any person other than appropriate law enforcement personnel, to said premises pending further order of this Court.

The plaintiff further prays that the Court will award the expenses and costs of this action and such reasonable

attorney's fees as the Court may deem appropriate to the plaintiff, all pursuant to 34-4-30.5-2(6), and for all other just and proper relief in the premises.

/s/ Philip R. Blowers
Deputing Prosecuting Attorney
for the Nineteenth
Judicial Circuit
560 City County Building
Indianapolis, Indiana 46204
Telephone: 236-3522

VERIFICATION

I affirm under the penalties of perjury that the representations contained in the foregoing Verified Petition for Seizure of Property Subject to Forfeiture are true.

/s/ Philip R. Blowers
Philip R. Blowers, Deputy
Prosecuting Attorney for the
Nineteenth Judicial Circuit

PLAINTIFF'S EXHIBIT A
AFFIDAVIT

I, THOMAS R. ROGERS, believe or have reason to believe based upon personal knowledge and creditable hearsay information the following:

On July 25, 1983, I went into the Adult Toy and Gift Shop located at 6753 E. 38th Street. Upon entering, I could see that the business had for sale on display differenet types of sexually oriented material. Immediately within the store is a display of sexually explicit magazines, video tapes, eight millemeter films and sexual aid devices. I went to the 8 mm film section and a clerk by the name of William E. Long, Jr. unlocked the display cabinet and handed me the films that I had selected; two films that revealed sexual depictions on the cover that contained the film. I asked Long if the films inside were new and did they depict the same thing that was on the cover. He answered that they did and told me each film was $12.95 plus tax. I purchased both films, entitled "Anal Madness" and "Spin the Bottle". A review of the two films revealed that bot. films depicted men and women in sexual intercourse and deviate sexual conduct. I then went to the "live peep" section within the store and entered a "conversation booth". Then I picked up the telephone a spoke to a female identified as "Shawn". Shawn directed me to put some money in the coin operated device that operated the lights. I did so and the lights came on her side of the booth. Shawn, advised me for a tip she would get naked for me. I gave her a tip and she took off all of her clothing and layed on the floor of the booth spreading her legs and genitals apart with her fingers, exposing her private

parts and anus She began to masterbate and continued to do so until the time ran out on the coin device that operated the lights.

I then went to World Video located at 4447 N. Keystone and upon entering, I could see that they had for sale many X-rated video tapes and 8 mm films. I spoke to a clerk by the name of Lori Jacobs in regards to a video tape entitled "Hot Summer Night" that was on display for $79.95. I asked her if that was the price and she said I could probably get it cheaper if I would talk to the manager. I asked about the "8 mm" films that were on display behind the counter. I selected two films entitled "Afternoon Delight" and "Sexual Negotiations" and asked Jacobs if the films depicted the same thing that was depicted on the cover of the film. The cover featured men and women engaged in explicit sexual conduct. I was advised by Jacobs that the price of the film was $10.95 plus tax. I was about to pay for them when another female by the name of Cynthia Smith came from the back room and I asked if she was the manager. She said she was and I asked her about discounting the video tape entitled "Hot Summer Night". She said that I probably wouldn't like that film because she saw it and said "it was pretty rough." She liked things a little more gentle. She then told me that I could have it for $40.60. I then paid for the two 8 mm films and left to go call for a uniformed police officer to identify the two women I had just talked to. Officer John Ferguson arrived and went in to talk to Lori Jacobs and Cynthia Smith. Smith told Officer Ferguson that she was opening a new store at 38th and Lafayette Road and named the number of movie booths the new store was going to have, and other features of the store.

A review of the two films I purchased from the "World Video" revealed that both films depicted men and women engaged in sexual intercourse and deviate sexual conduct.

On July 26, 1983 I went back to the "Adult Toy and Gift Shop" located at 6753 E. 38th Street and purchased two more films entitled "Big Load" and "Gyro Sex". This time the purchase was made from a Robert Beaman. A review of the films revealed that both films depicted men and women engaged in sexual intercourse and deviate sexual conduct. On this same day, Detective Steve Verplank went to the "World Video" and purchased the video tape entitled "Hot Summer Night". A review of this tape found that it depicted four men forcing a young female to perform oral sex, sexual intercourse and beating the woman with a belt. This officer has retained possession of all materials as stated in the incidents above. Said materials are attached here as exhibits hereto in sealed paper containers. Containers denominated Exhibits A, B, C and D.

On July 29, 1983, Detective Joseph Brannon went into the Plaza Entertainment Center, located at 4276 W. 38th Street. The business appeared to be open. However, when Detective Brannon entered the business he could see that there were several construction workers working on the building. He told me that there were magazines, films and other sexually oriented materials for sale.. He asked a worker if they were open yet, and the worker said not until Monday, implying August 1, 1983. The worker then showed Detective Brannon the "live peep" section within the store, and the mini theatre section within the

store. The worker told Brannon that the theatre section was not completed, but was expected to be finished by December.

This affiant has conducted numerous investigations into businesses of this nature and I have reasonable belief that Adult Toy and Gift Shop and World Video are owned and operated by an enterprise consisting of various corporations and individuals named in the Complaint attached hereto (specifically rhetorical paragraphs 5 through 17) in a manner violative of I. C. 35-30-10.1-2 and the provisions of the Indiana R.I.C.O. Act. This affiant has personally seen various papers, records, applications and other documents concerning both World Video and Adult Toy and Gift that would support this belief and this, together with statements made to this officer and other officers of the Indianapolis Police Department, would lead this affiant to believe that Plaza Entertainment Center is a part of the enterprise that operates Adult Toy and Gift and World Video adult bookstores, under common ownership or control.

All of the events described above occurred in Marion County, Indiana.

/s/ Thomas R. Rodgers
Detective Sgt.,
Indianapolis Police Department

Subscribed and sworn to before me this 1 day of August, 1983.

/s/ D. J. Daniels
Deputy Prosecuting Attorney
Nineteenth Judicial Circuit

(Certifice of Service omitted in printing.)

IN THE MARION COUNTY CIRCUIT COURT
CAUSE NO. C83-1788

(Title omitted in printing.)

FILED

AUG 4 1983

/s/ Bernard J. Gohmann, Jr.
Clerk

MOTION TO CONTINUE

Comes now the Defendant 4447 Corporation, and moves the Court to continue as follows:

1. That the matter is set for hearing on August 4, 1983.

2. That there has been only seventy-two (72) hours notice in order to prepare.

3. That there are substantial constitutional issues involved, including, but not limited to the First Amendment, the Fourteenth Amendment, due process provisions as well as State constitutional issues.

4. That in order properly brief and request the appropriate relief it will be ..ecessary to present to the Court appropriate citations, briefs and authority for each of the issues involved.

5. That this Court has already taken *drastic* measures in issuing a preliminary injunction without a hearing, *ex parte*, without notice; such action being subject to review and briefing as well.

WHEREFORE, Defendant prays for an Order from this Court continuing this matter and for all other just and proper relief in the premises.

Respectfully submitted,

TAYLOR & RUBIN, P.C.
By /s/ Stephen M. Taylor

(Certificate of Service omitted in printing.)

IN THE CIRCUIT COURT OF MARION COUNTY
CAUSE NO. C83-346

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

(Title omitted in printing.)

FILED
SEP 8 1983

/s/ Helen Porter
Clerk Hamilton Circuit Court

AMENDED COMPLAINT

1. Stephen Goldsmith, as Prosecuting Attorney for the Nineteenth Judicial Circuit of Indiana, brings this civil action for injunctive and other relief, under the Indiana Racketeer Influenced and Corrupt Organization statute ("R.I.C.O. Action) 34-4-30.5-1 et seq. Indiana Code (1982) alleging as follows:

Jurisdiction

2. Jurisdiction of this matter is conferred upon this Court by I. C. 34-4-30.5-2 and 3.

Statutory Authority

3. The statutory authority relied upon by Plaintiff in this case is the Racketeer Influenced and Corrupt Organizations Act (R.I.C.O.) I.C. 35-45-6-1 - 35-45-6-2, Indiana Code, 1982 and Civil Procedure Code Special Proceedings Civil Remedies for Racketeering Activity I.C. 34-4-30.5-1 - 34-4-30.5-6.

Parties

Plaintiff, Stephen Goldsmith, is the duly elected Prosecuting Attorney for the Nineteenth Judicial Circuit of Indiana. The Prosecuting Attorney is authorized to bring this action by I.C. 34-4-30.5-2.

4. The defendants, 4447 Corporation d/b/a World Video Systems, Inc., is a retail video store located at 4447 North Keystone Avenue, Indianapolis, Marion County, Indiana. The defendant, 4447 Corporation, is an Indiana corporation and said corporation was incorporated on April 22, 1983.

5. The defendant, World Video Systems, Inc., is an Indiana corporation located at 6801 East 38th Street, Indianapolis, Marion County, Indiana.

6. The defendant I.S.S.I. Theatre, Inc. d/b/a Adult Toy and Gift, is a retail video store and bookstore located at 6755 East 38th Street, Indianapolis, Marion County, Indiana. The defendant, I.S.S.I. Theatre, Inc. is a Deleware corporation, and said corporation was admitted to do business in the State of Indiana on June 5, 1978.

7. The defendants, Ivan M. Chalfie and Henry Kahn d/b/a Disk Development Company, are a real estate firm located at 9566 Allisonville Road, Indianapolis, Marion County, Indiana. The defendant, Disk Development Company, owns the real estate at 4447 North Keystone, the location of the defendant, 4447 Corporation d/b/a World Video Systems, Inc. retail video store.

8. The defendant, Burton Gorelick, is a resident of the State of Michigan. The defendant, Burton Gorelick, is the real property owner of the lots at 6755 E. 38th Street,

Indianapolis, Marion County, Indiana, the location of the defendant, I.S.S.I. Theatre, Inc. d/b/a Adult Toy and Gift.

9. The defendant, Burke Mendenhall, is a resident of the State of Indiana. The defendant, Burke Mendenhall is the real property owner of 4276 W. 38th Street, the location of the defendant, Plaza Entertainment Center.

10. The defendants, Cynthia Smith, Laurie Jacobs, William E. Long and Robert Beaman, are all residents of the State of Indiana. All of these defendants, at all times relevant herein, were either employed by or associated with an enterprise in Marion County, and all of the above-named defendants have conducted or participated directly or indirectly, in such enterprise through a pattern of racketeering activity as is more fully set forth herein.

The Burton Gorelick Enterprise

11. Plaintiff, Stephen Goldsmith, Prosecuting Attorney for the Nineteenth Judicial Circuit of Indiana, brings this lawsuit pursuant to I.C. 34-4-30.5, alleging that Burton Gorelick and all of the individual and corporate defendants named above did form an illegal enterprise, consisting of the above-named persons, whose function in said enterprise have included ownership, operation, management or employment by the corporations named herein, for the purpose of economic gain, through said racketeering activity.

12. The purpose of this enterprise is to operate, in Marion County, Indiana, "adult bookstores," which bookstores operate for the purpose of selling, distributing, or showing or offering to sell, distribute or show, or have

in its possession, custody or control with intent to sell, distribute, show or advertise in any manner, obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic books, magazines, periodicals, newspapers, photographs, motion picture films, or articles or instruments of indecent use or purpose.

13. Said enterprise knowingly writes, prints, publishes or utters or causes to be written, printed, published or uttered advertisements or notices, giving information, directly or indirectly, stating, or purporting to state, where, how, or whom or by what means any or what purpose to be any, such material, matter, article, or t z of any such character can be purchased, obtained or had.

14. Said enterprise knowingly hires, employs, uses or permits persons to do or assist in doing either knowingly or innocently, acts in violation of I.C. 34-4-30.5-2 and I.C 35-45-6-2(3).

15. In addition to the above, said enterprise, by and through its corporations, owners, managers, and employees, distributes obscene materials on a daily basis, knowing the obscene nature thereof, in that said enterprise, by and through its corporations, owners, managers, and employees, sells, exhibits, or otherwise disseminates to other persons, obscene material or said enterprise offers to do so or said enterprise possesses such material with intent to do so in violation of I.C. 34-4-30.5-2 and 35-45-6-2(3).

Facts and R.I.C.O. Violations

16. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 15 above and further alleges as follows:

17. Beginning on or about June 5, 1978 and continuing up to, and including, August 1, 1983, and at diverse times and between said dates, all the above-named defendants were employed by or associated with, the Gorelick Enterprise, and all of the above named defendants did conduct or participate, directly or indirectly, in said enterprise, through a pattern of racketeering activity as is more fully set forth below, to-wit:

a. All of the above-named defendants, as participants in the enterprise, did engage in at least two incidents of racketeering conduct in that each defendant did at least twice between said dates, knowingly sell, distribute or show or offer to sell, distribute or show, or have in its or his possession, custody or control with intent to sell, distribute, show or advertise in any manner, obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic books, magazines, periodicals, newspapers, photographs, motion picture films, or articles or instruments of indecent use or purpose;

b. Said defendants did knowingly, as participants in the enterprise, between the above-referenced dates, write, print, publish or utter, or cause to be written, printed, published or uttered, advertisements or notices, giving information which stated or purported to state, where, how, of whom, or by what means any, what purported to be any such material, matter, article, or thing of any such character could be purchased, obtained, or had;

c. Said defendants did knowingly, as participants in the enterprise, between the above referenced dates hire, employ, use or permit any person to do or assist in doing, either knowingly or innocently, the acts or things men-

tioned above with each separate incident set forth above being in violation of I.C. 35-30-10.1-2.

d. Each separate incident set forth above constitutes a violation of I.C. 35-30-10.1-2, and any two such incidents set forth above in addition to any one of the incidents set forth previously constitutes violations of I.C. 35-45-6-2 (a)(3).

e. All of the above-named defendants did, between the above-referenced dates, own, operate, manage, maintain employment with, the Gorelick Enterprise, and more specifically, each of the above-named defendants were, and/or, are employed by, or associated with the Gorelick Enterprise, as defined and identified herein.

f. All of the above-named defendants did conduct or participate, directly or indirectly, the the Gorelick Enterprise as set forth above through a pattern of racketeering activity in violation of I.C. 35-45-6-2(a)(3) in that they engaged in two or more incidents of said racketeering conduct which had the same or similar intents, results, accomplices, victims, methods or commission or other interrelated incidents of the same kind each.

g. Further, the defendants, 4447 Corporation d/b/a World Video Systems, Inc., I.S.S.I. Theatre Corp. d/b/a Adult Toy and Gift, and Burton Gorelick did, in violation of I.C. 35-30-10.1-1 and I.C. 35-30-10.1 and I.C. 35-45-6-2 (a)(3), knowingly hire, employ, use or permit persons to do or assist in doing, either knowingly or innocently any act or thing mentioned above, more specifically the defendants named in this paragraph did knowingly hire, employ, use or permit Barbara Byrnes, Herbert Allen, James

Lewellyn, Roger Summers, Eugene Yarmy, Georgia Meyers, Herb Trout, Cindy Smith, Laurie Jacobs, William E. Long, Robert Beaman, and other persons whose identities are unknown to the plaintiff at this time, to do and assist in doing, either knowingly or innocently, acts mentioned above, with each such incident being in violation of I.C. 35-30-10.1-2. Any two such incidents set forth in this paragraph, in addition to any one of the incidents set forth in any other paragraph in this allegation, constitute violation of I.C. 35-45-6-2(a)(3).

18. Based upon the above, and information provided by the agents of the Indianapolis Police Department who have been conducting the investigation of The Gorelick Enterprise, plaintiff believes that The Gorelick Enterprise will continue to operate in violation of R.I.C.O. statutes, unless the below sought relief is granted.

WHEREFORE, the plaintiff prays for judgment against the defendants, and each of them, as follows:

1. Order defendants to immediately list and state the location of all property, real and personal, including money that defendants own or have title to or any right, interest or equity in;

2. Subject all personal and real properties, money, intangibles, and corporate interest and activities acquired or maintained in violation of the R.I.C.O. Act to Court supervision, and order defendants to refrain from disposing of, transferring, relocating, dissipating, or otherwise altering the status of said properties or corporate entities without prior approval of the Court.

3. Pursuant to I.C. 34-4-30.5-2(1) order all defendants to divest themselves of any interest in any and all enterprise, including real property.

4. Pursuant to I.C. 34-4-30.5-3(a) order forfeiture of all property and other things of value, real or personal, tangible and intangible, including money, used in the course of, intended for use in the course of, derived from or realized through conduct in violation of I.C. 35-45-6-2.

5. Pursuant to I.C. 34-4-30.5-2(4) order the suspension of a license, permit, or prior approval granted to defendants by any agency of the State.

6. Pursuant to I.C. 34-4-30.5-2(5) order the forfeiture of the charter of those defendant corporations organized under the laws of the State of Indiana or where appropriate, revocation of the certificates authorizing foreign corporations to conduct business within the state.

Plaintiff asks that this Court sequester and subject to Court supervision all bank accounts held by the individual and corporate defendants herein, and supervise the sale, transfer or the disposition of any real or personal properties by said defendants, and for all other just and proper relief in the premises.

/s/ J. Gregory Garrison
Deputy Prosecuting Attorney for
the Nineteenth Judicial Circuit
City County Building, Room 560
Indianapolis, Indiana 46204

(CERTIFICATE OF SERVICE omitted in printing)

IN THE HAMILTON COUNTY CIRCUIT COURT
CAUSE NO. C83-346

(Title omitted in printing)

STATE OF INDIANA)
) ss:
COUNTY OF HAMILTON)

(Filed September 13, 1983)

MOTION TO CONTINUE

Comes now the Defendant, 4447 CORPORATION, by counsel, Franklin I. Miroff, and moves the Court for a continuance of the deposition as follows:

1. That this matter is substantial and complex.

2. That there are substantial and difficult Fifth Amendment issues.

3. That the Defendant's counsel has just been contacted regarding the depositions.

4. That it is necessary to have at least two (2) weeks to prepare for these depositions.

5. That counsel conflicts on his calendar in that he is trying *Hughes -vs- Hughes* in Marion County Superior Court, Civil Division, Room #3 and *Haberman -vs- Haberman* in Marion County Superior Court, both on September 15, 1983, and it will be impossible for the other counsel to be there on such short notice.

6. That several of the attorneys are from another state and those counsel need at least two to three weeks notice.

WHEREFORE, the Defendant, by counsel, prays for an Order from this Court continuing the deposition and for all other just and proper relief in the premises.

Respectfully submitted,
ANCEL, MIROFF & FRANK, P.C.

By: /s/ Franklin I. Miroff

(CERTIFICATE OF SERVICE omitted in printing)

IN THE
COURT OF APPEALS OF INDIANA
FOURTH DISTRICT

4447 CORPORATION, WORLD VIDEO SYSTEMS, ISSI THEATRE CORPORATION, PLAZA ENTERTAINMENT CENTER and BURTON GORELICK,	)	Interlocutory Appeal From the Hamilton Circuit Court
Appellants (Defendants Below),	)	No. 4-1283 A 415
v	)	(Filed February 2, 1984)
STEPHEN GOLDSMITH, PROSECUTING ATTORNEY FOR NINETEENTH JUDICIAL CIRCUIT,	)	The Honorable Judith S. Proffitt, Judge
Appellee (Plaintiff Below),	)	

ORDER UPON INTERLOCUTORY APPEAL

Comes now 4447 Corporation, World Video Systems, Issi Theatre Corporation, Plaza Entertainment Center and Burton Gorelick, appellants, by counsel, John H. Weston, and Stephen Goldsmith, Prosecuting Attorney for the Nineteenth Judicial Circuit, appellee, by counsel, Richard E. Hendrickson, Deputy Attorney General, and appellants' Motion for Stay (Modification) of Interlocutory Injunction Without Bond Pending Appeal is submitted to the Court, Fourth District. Oral argument is had and the Court being duly advised now grants appellants' Motion for Stay, Conover, J., dissenting.

It is therefore Ordered, Adjudged and Decreed by the Court that the Order heretofore entered by the Circuit

Court of Marion County, The Honorable Anthony J. Metz, Judge Pro Tem presiding, in Cause No. C83-1788, dated August 1, 1983, is hereby modified pending appeal in the following respects:

A. That the Indianapolis Police Department shall forthwith unlock, unseal and release all property within the commercial building at 4266 [erroneously designated 4276] West 38th Street, Marion County, Indiana, which property had heretofore been locked, sealed and secured pursuant to the Order of the Marion County Circuit Court, filed August 1, 1983; and

B. Defendants shall preserve all property at 4266 West 38th Street, Marion County, Indiana, until further order of this Court; defendants shall not transfer or remove from said building any fixtures, cabinets, cameras, audio or video equipment, cash registers or other property until further order of this Court. This paragraph shall not prevent defendants at 4266 West 38th Street, Marion County, Indiana, from transferring or selling books, magazines, newspapers or videotapes. However, until further order of this Court, all other property shall be held by the defendants.

DATED: February 2, 1984

/s/ Paul H. Buchanan
CHIEF JUDGE
Court of Appeals of Indiana

STATE OF INDIANA V.
RONALD W. SAPPENFIELD, *et al.*

RELEVANT DOCKET ENTRIES

Date of Filing	
4/8/85	State of Indiana files informations charging defendants, and each of them, in Counts I, II and III with the offense of Sale or Distribution Obscene Matter; Count IV with the offense of Corrupt Business Influence; Count V, VI and VII with the offense of Sale or Distribution of Obscene Matter; Count VIII with the offense of Corrupt Business Influence together with Affidavits as to probable cause for defendants' arrests.
	Court finds probable cause and orders WARRANT for each of the defendants and fixes bailbond for the defendants, and each of them, in the sum of $7,500.00. Defendants, Fantasy One, Inc. and Fantasy Two, Inc., are to be served warrants by serving resident agent, Ronald W. Sappenfield.
4/10/85	Sheriff files notice that defendant, Ronald W. Sappenfield, has bonded out of jail.
4/19/85	State of Indiana appears by Rodney Shrock. Defendant, Ronald Sappenfield, appears in open court with his counsel, Joseph A. Noel. Defendant is advised of the eight counts of information against him. Defendant, Ronald Sappenfield, waives formal reading of the informations. Said defendant is read the statutes and penalties. Court now enters a plea of Not Guilty and request for jury trial. Court sets omnibus hearing for June 21, 1985 and trial by jury for 9:30 A.M., August 27th, 28th and 29th, 1985.
6/4/85	Richard Kammen of the firm of McClure, McClure, & Kammen, 235 North Delaware, In-

dianapolis, Indiana 46204, Telephone 632-6341, file written Appearance for the defendants. Defendants file Motion to Dismiss Counts IV and VIII of the information, together with Memorandum of Law attached. Time fixed for hearing 9:30 A.M., June 21, 1985. The Court notifies counsel of hearing date by copy of this docket card.

6/14/85 State of Indiana files State's Reply Memorandum to Defendant Ronald W. Sappenfield's Motion to Dismiss.

8/23/85 State of Indiana appears by Rodney Shrock. Defendant appears by counsel. Submitted on defendant, Ronald Sappenfield's motion to dismiss. Arguments heard. Taken under advisement. State of Indiana files Motion for Discovery.

State of Indiana files response to Defendants' Motion for Discovery.

9/18/85 The Court having taken the defendants' Motion to Dismiss under advisement now grants the defendants' Motion to Dismiss as to Counts IV and VIII as per written ruling on Motion to Dismiss.

9/19/85 State of Indiana files Motion to Dismiss as to defendant Connie Sappenfield aka Connie Van Curen. Cause ordered dismissed as to said defendant, only.

11/15/85 Rodney V. Shrock counsel for State of Indiana, files Motion to Correct Errors with the court and with Honorable Dennis H. Parry. Time is fixed for hearing at 1:30 p.m., December 12, 1985. Court notifies Rodney V. Shrock and Joseph A. Noel.

Rodney V. Shrock files Statement of Facts and Grounds upon Which Errors Are Based.

Rodney V. Shrock files copy of Motion to Correct Errors and statement on the Judge.

12/18/85 The court having taken the Motion to correct errors under advisement, now overrules and denies said motion. Court notifies counsel.

12/17/85 State of Indiana files Praecipe for Record of the Proceedings.

IN THE HOWARD SUPERIOR COURT
DIVISION I

CAUSE NUMBER 2630

STATE OF INDIANA)
) SS:
COUNTY OF HOWARD)

STATE OF INDIANA	)	
	)	
VS.	)	CAUSE NUMBER 2630
	)	
RONALD W. SAPPENFIELD,	)	
CONNIE SAPPENFIELD,	)	(Filed April 8, 1985)
FANTASY ONE, INC., and	)	
FANTASY TWO, INC.	)	

INFORMATION FOR COUNT I

Sale or Distribution of Obscene Matter

(Class A Misdemeanor)

The undersigned, being duly sworn upon oath, says:

That on or about the 29th day of October, 1984, in the County of Howard, State of Indiana, Ronald W. Sappenfield, Connie Sappenfield, and Fantasy One, Inc., did unlawfully, knowingly or intentionally sell or distribute obscene matter to Gordon Tocco to-wit: a magazine entitled "Cum On TV" which depicts on the front cover a male/female hermaphrodite engaging in anal sex and on the back cover depicts a male/female hermaphrodite engaging in oral sex without any restrictions that the average person, applying contemporary community standards, would find the dominant theme of the magazine taken as a whole, appeals to the prurient interest in sex and depicts in a potently offensive way sexual conduct and further the magazine taken as a whole lacks serious literary, artistic, political or scientific value, all of which is contrary to the form

of the Statute in such case made and provided, to-wit: I.C. 35-49-3-1.

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-85

/s/ Carole L. Harbaugh

NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA)
) SS:
COUNTY OF HOWARD)

STATE OF INDIANA	)	
	)	
VS.	)	CAUSE NUMBER 2630
	)	
RONALD W. SAPPENFIELD,	)	
CONNIE SAPPENFIELD,	)	(Filed April 8, 1985)
FANTASY ONE, INC., and	)	
FANTASY TWO, INC.	)	

INFORMATION FOR COUNT II
Sale or Distribution of Obscene Matter

(Class A Misdemeanor)

The undersigned, being duly sworn upon oath, says:

That on or about the 15th day of November, 1984, in the County of Howard, State of Indiana, Ronald W. Sap-

penfield, Connie Sappenfield, and Fantasy One., Inc., did unlawfully, knowingly or intentionally sell or distribute obscene matter to Gordon Tocco, to-wit: a magazine entitled "Asshole Buddies Special" which depicts on the front cover male persons engaged in anal sexual conduct by the use of a penis or finger and depicts on the back cover a male performing oral sex on the anus of another male without any restrictions that the average person, applying contemporary community standards, would find the dominant theme of the magazine, taken as a whole, appeals to the prurient interest in sex and depicts in a patently offensive way sexual conduct and further the magazine taken as a whole lacks serious literary, artistic, political or scientific value, all of which is contrary to the form of the Statute in such case made and provided, to-wit: I.C. 35-49-3-1.

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-87

/s/ Carole L. Harbaugh
NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA)		
) SS:		
COUNTY OF HOWARD)		
STATE OF INDIANA	)	
	)	
VS.	)	CAUSE
	)	NUMBER 2630
RONALD W. SAPPENFIELD,	)	
CONNIE SAPPENFIELD,	)	(Filed April 8, 1985)
FANTASY ONE, INC., and	)	
FANTASY TWO, INC.	)	

INFORMATION FOR COUNT III
Sale or Distribution of Obscene Matter

(Class A Misdemeanor)

The undersigned, being duly sworn upon oath, says:

That on or about the 3rd day of December, 1984, in the County of Howard, State of Indiana, Ronald W. Sappenfield, Connie Sappenfield, and Fantasy One, Inc., did unlawfully, knowingly or intentionally sell or distribute obscene matter to Gordon Tocco, to-wit: a magazine entitled "Tight Buns" which depicts on the front cover two males engaging in anal sex and masturbation and on the back cover depicts two males masturbating without any restrictions that the average person, applying contemporary community standards, would find the dominant theme of the magazine, taken as a whole, appeals to the prurient interest in sex and depicts in a patently offensive way sexual conduct and further the magazine taken as a whole lacks serious literary, artistic, political or scientific value, all of

which is contrary to the form of the Statute in such case made and provided, to-wit: I.C. 35-49-3-1.

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-87

/s/ Carole L. Harbaugh
NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA)
) SS:
COUNTY OF HOWARD)

STATE OF INDIANA	)	
	)	
VS.	)	CAUSE
	)	NUMBER 2630
RONALD W. SAPPENFIELD,	)	
CONNIE SAPPENFIELD,	)	(Filed April 8, 1985)
FANTASY ONE, INC., and	)	
FANTASY TWO, INC.	)	

INFORMATION FOR COUNT IV

Corrupt Business Influence

The undersigned, being duly sworn upon oath, says:

That from on or about October 29, 1984 to on or about December 3, 1984, Ronald W. Sappenfield, Connie Sappenfield, and Fantasy One, Inc., in Howard County, State of Indiana, did knowingly or intentionally participate in the activities of an enterprise, to-wit: Fantasyland 1, through a pattern of racketeering activity, to-wit:

A. An offense against I.C. 35-30-10.1-2, in that the defendants did knowingly or intentionally offer to distribute or sell to Gordon Tocco obscene matter, to-wit: the magazine "Cum On TV", all of which occurred in Howard County, State of Indiana on October 29, 1984; and

B. An offense against I.C. 35-30-10.1-2, in that the defendants did knowingly or intentionally offer to distribute or sell to Gordon Tocco obscene matter, to-wit: the magazine "Asshole Buddies Special", all of which occurred in Howard County, State of Indiana on November 15, 1984; and

C. An offense against I.C. 35-30-10.1-2, in that the defendants did knowingly or intentionally offer to distribute or sell to Gordon Tocco obscene matter, to-wit: the magazine "Tight Buns", all of which occurred in Howard County, State of Indiana on December 3, 1984.

All of which is contrary to the form of the Statute in such case made and provided, to-wit: I.C. 35-45-6-2(3).

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-87

/s/ Carole L. Harbaugh
NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA)
) SS:
COUNTY OF HOWARD)

STATE OF INDIANA	)	
	)	
VS.	)	CAUSE
	)	NUMBER 2630
RONALD W. SAPPENFIELD,	)	
CONNIE SAPPENFIELD,	)	(Filed April 8, 1985)
FANTASY ONE, INC., and	)	
FANTASY TWO, INC.	)	

INFORMATION FOR COUNT V
Sale or Distribution of Obscene Matter

(Class A Misdemeanor)

The undersigned, being duly sworn upon oath, says:

That on or about the 29th day of October, 1984, in the County of Howard, State of Indiana, Ronald W. Sappenfield, Connie Sappenfield, and Fantasy Two, Inc., did unlawfully, knowingly or intentionally sell or distribute obscene matter to Gordon Tocco, to-wit: a magazine entitled "Stud Alley" which depicts on the front cover two males performing oral sex and depicts on the back cover two males performing oral sex without any restrictions that the average person, applying contemporary community standards, would find the dominant theme of the magazine taken as a whole, appeals to the prurient interest in sex and depicts in a patently offensive way sexual conduct and further the magazine taken as a whole lacks serious literary, political or scientific value, all of which is contrary

to the form of the Statute in such case made and provided, to-wit: I.C. 35-49-3-1.

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-87

/s/ Carole L. Harbaugh
NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA)
) SS:
COUNTY OF HOWARD)

STATE OF INDIANA	)	
	)	
VS.	)	CAUSE
	)	NUMBER 2630
RONALD W. SAPPENFIELD,	)	
CONNIE SAPPENFIELD,	)	(Filed April 8, 1985)
FANTASY ONE, INC., and	)	
FANTASY TWO, INC.	)	

INFORMATION FOR COUNT VI
Sale or Distribution of Obscene Matter

(Class A Misdemeanor)

The undersigned, being duly sworn upon oath, says:

That on or about the 15th day of November, 1984, in the County of Howard, State of Indiana, Ronald W. Sap-

penfield, Connie Sappenfield, and Fantasy Two, Inc., did unlawfully, knowingly or intentionally sell or distribute obscene matter to Gordon Tocco, to-wit: a magazine entitled "Four Play Guys" which depicts on the front cover male persons engaged in oral sex and depicts on the back cover males engaged in oral and anal sex without any restrictions that the average person, applying contemporary community standards, would find the dominant theme of the magazine, taken as a whole, appeals to the prurient interest in sex and depicts in a patently offensive way sexual conduct and further the magazine taken as a whole lacks serious literary, artistic, political or scientific value, all of which is contrary to the form of the Statute in such case made and provided, to-wit: I.C. 35-49-3-1.

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-87

/s/ Carole L. Harbaugh
NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA)
) SS:
COUNTY OF HOWARD)

STATE OF INDIANA	)	
	)	
VS.	)	CAUSE
	)	NUMBER 2630
RONALD W. SAPPENFIELD,	)	
CONNIE SAPPENFIELD,	)	(Filed April 8, 1985)
FANTASY ONE, INC., and	)	
FANTASY TWO, INC.	)	

INFORMATION FOR COUNT VII
Sale or Distribution of Obscene Matter

(Class A Misdemeanor)

The undersigned, being duly sworn upon oath, says:

That on or about the 3rd day of December, 1984, in the County of Howard, State of Indiana, Ronald W. Sappenfield, Connie Sappenfield, and Fantasy Two, Inc., did unlawfully, knowingly or intentionally sell or distribute obscene matter to Gordon Tocco, to-wit: a magazine entitled "Encounter" which depicts on the front cover two males engaging in mouth to anus sexual contact and on the back cover depicts two males engaging in anal sex without any restrictions that the average person, applying contemporary community standards, would find the dominant theme of the magazine, taken as a whole, appeals to the prurient interest in sex and depicts in a patently offensive way sexual conduct and further the magazine taken as a whole lacks serious literary, artistic, political or scientific value, all of which is contrary to the form of the Statute in such case made and provided, to-wit: I.C. 35-49-3-1.

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-87

/s/ Carole L. Harbaugh
NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA)
) SS:
COUNTY OF HOWARD)

STATE OF INDIANA	)	
	)	
VS.	)	CAUSE
	)	NUMBER 2630
RONALD W. SAPPENFIELD,	)	
CONNIE SAPPENFIELD,	)	(Filed April 8, 1985)
FANTASY ONE, INC., and	)	
FANTASY TWO, INC.	)	

INFORMATION FOR COUNT VIII

Corrupt Business Influence

The undersigned, being duly sworn upon oath, says:

That from on or about October 29, 1984 to on or about December 3, 1984, Ronald W. Sappenfield, Connie Sappenfield, and Fantasy Two, Inc., in Howard County, State of Indiana, did knowingly or intentionally participate in the activities of an enterprise, to-wit: Fantasyland II, through a pattern of racketeering activity, to-wit:

A. An offense against I.C. 35-30-10.1-2, in that the Defendants did knowingly or intentionally offer to distribute or sell to Gordon Tocco obscene matter, to-wit: the

magazine "Stud Alley" all of which occurred in Howard County, State of Indiana on October 29, 1984; and

B. An offense against I.C. 35-30-10.1-2, in that the Defendants did knowingly or intentionally offer to distribute or sell to Gordon Tocco obscene matter, to-wit: the magazine "Four Play Guys" all of which occurred in Howard County, State of Indiana on November 15, 1984; and

C. An offense against I.C. 35-30-10.1-2, in that the Defendants did knowingly or intentionally offer to distribute or sell to Gordon Tocco obscene matter, to-wit: the magazine "Encounter" all of which occurred in Howard County, State of Indiana on December 3, 1984.

All of which is contrary to the form of the Statute in such case made and provided, to-wit: I.C. 35-45-6-2(3).

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-87

/s/ Carole L. Harbough
NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA)
) ss:
COUNTY OF HOWARD)

CAUSE NO. 2630

(Title omitted in printing)

(Filed June 4, 1985)

MOTION TO DISMISS

Comes now the defendant, by counsel, and moves the court to dismiss Counts IV and VIII of the information herein for each of the following reasons:

1. The statute upon which the information is based is unconstitutional, as applied in this case, in that said statute, as applied, violates the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America.

2. The statute upon which the information is based is unconstitutional, as applied in this case, in that said statute, as applied, violates Article I, Sections 3, 4, 9, 12, 13, 14, 16, 17, 21, 23, and 31 of the Constitution of the State of Indiana.

3. The information herein is unlawfully vague.

4. The information herein does not state an offense with sufficient certainty.

5. The facts, as stated in the information herein, do not constitute a public offense.

6. The information herein is duplicitous.

7. There exists a jurisdictional impediment to the conviction of the defendant for the offense charged, to-wit: the defendant has not previously been convicted of any violations of I.C. 35-30-10.1-1, *et seq.*

8. There exists a jurisdictional impediment to the continuation of the charges against the defendant, to-wit: the defendant has never been accorded, pursuant to statute, either notice of, and an opportunity, for the Court to determine whether or not materials obtained by the State of Indiana are probably obscene, as defined and required by I.C. 35-30-10.1-1 *et seq.*

9. The law, as applied, is unconstitutional, in that the defendant was never accorded an opportunity for a prompt hearing on probable obscenity either prior to, or subsequent to, the seizure of the materials, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

Respectfully submitted,

/s/ Richard Kammen
McCLURE, McCLURE & KAMMEN
235 North Delaware
Indianapolis, Indiana 46204
Telephone: (317) 632-6341
Counsel for Defendant

MEMORANDUM OF LAW

Specifications 1, 2, and 8 of the Defendant's Motion to Dismiss are based upon the failure of the State of Indiana, in both the drafting of the criminal statute under

which the defendant stands charged and the application of this statute, to follow the requirements of the First Amendment to the Constitution of the United States of America, and Article I, Sections 3, 4, 9, 12, 13, 14, 16, 17, 21, 23, and 31 of the Constitution of the State of Indiana.

Several things are clear. All printed matter, all movies, and all publications of any sort are clothed with the presumption that they are legitimate and protected by the First Amendment to the Constitution of the United States of America. *Doran v. Salem Inn,* 422 U.S. 922; *Samel Inn, Inc. v. Frank,* 522 F.2d 1045; *Southeastern Promotions Limited v. Conrad,* 420 U.S. 546 (1975); *Lee Art Theatre v. Virginia,* 392 U.S. 636; *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676; *Jacobellis v. Ohio,* 378 U.S. 184; *Joseph Burstein, Inc. v. Wilson,* 343 U.S. 495; *Roaden v. Kentucky,* 413 U.S. 57; *Bantum Books v. Sullivan,* 372 U.S. 58; *Quantity of Books v. Kansas,* 378 U.S. 205. Even if an individual is arrested and charged with distribution of obscene matter, the matter is still cloaked with the presumption that it is protected, and remains so cloaked unless and until the individual charged is in fact convicted. *Heller v. New York,* 413 U.S. 483. See also *United States v. Thirty-seven Photographs,* 402 U.S. 363; *Freedman v. Maryland,* 380 U.S. 51 (1965). In *Freedman,* the United States Supreme Court said:

> "Because only a judicial determination in an adversary proceeding insures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 402 U.S. at 367. See also *Bount v. Rizzi,* 400 U.S. 410, *Tittel Firm Corp. v. Kusek,* 390 U.S. 139.

A judgment that material is in fact obscene does not taint similar items. A judgment that material is obscene taints only that particular item. Quantity of *Books v. Kansas,* 378 U.S. 205; *Bantum Books v. Sullivan,* 83 S.Ct. 639; *Organization for a Better Austin v. Keefe,* 402 U.S. 415; *Carol v. President and Commissioner of Princess Anne County,* 393 U.S. 175.

Similarly, businesses which are convicted of selling obscene material may not be closed, nor may a permit or license be revoked or denied. *Universal Amusement Company v. Vance,* 100 S.Ct. 1156 (1980), 587 F.2d 159; *People ex rel. Busch v. Projection Room Theatre,* 550 P.2d 600 (1976); *General Corp. v. Sweeten,* 320 South 2d 668 (Alabama, 1975); *Kansas v. Motion Picture Entitled "The Bet",* 219 Kansas 63 (1976); *Gulf States Theatres of Louisiana v. Richardson,* 287 S.2d 480 (Louisiana, 1974); *New Riviera Arts Theatre v. Davis,* 219 Tennessee 652 (1967); *Society to Oppose Pornography, Inc. v. Thevis,* 255 S.2d 876; *Giarrusso v. D'Iberville Gallery,* 295 S.2d 891; *State ex rel. Blee v. Mohney Enterprises,* 289 N.E.2d 519 (Ind. App. 1973); *Sanders v. State,* 203 S.E.2d 152 (1974); *State ex rel. Field v. Hess,* 540 P2d; *Commonwealth ex rel. Davis v. Van Emberg,* 347 Atl. 2d 712; *City of Minot v. Central Avenue News, Inc.,* 308 N.W.2d 851; *Parish of Jefferson v. Bayou Landing Limited, Inc.,* 305 S.2d 158 (1977); *Nihiser v. Sendak,* 405 F.Supp. 1124; *Yuclan Enterprises, Inc. v. Arre,* 488 F.Supp. 820; *Avon Forty-Second St. Corp. v. Meyerson,* 352 F.Supp. 994; *Oregon Book Mark Corp. v. Shrunk,* 321 F.Supp. 639; *City of Seattle v. Bitner,* 505 P.2d 126.

Finally, because of its paramount place in the constellation of constitutionally protected freedoms, statutes

which touch upon the exercise of First Amendment rights are carefully scrutinized, and if, on examination, they hinder the exercise of First Amendment rights, they are unconstitutional, both under Federal and State Constitutions, *State v. Kubel,* 172 N.E.2d 45.

State v. Kubel, supra., provides an interesting analysis. In that case, the Indiana Supreme Court said:

> "Article I, Section 9, of the Constitution of Indiana provides 'no law shall be passed restraining the right to speak, write, or print freely on any subject whatso ever; but for the abuse of that right every person shall be responsible.'
>
> The State may, in the proper exercise of the police power, prevent the sale and distribution of obscene matter, but when this is attempted in a manner which tends to restrict the right of free speech or expression, then the right of free speech guaranteed by Article I, Section 9, must be weighed in the balance against the requirement of the public safety and welfare which are asserted by the restriction sought.
>
> When this test is applied to the situation with which we are now confronted, the scales weigh in favor of the right to free speech and free expression.
>
> The imposition of a strict liability by the statute here has the effect of restricting the free interchange of thought and opinion by requiring a bookseller to act at his peril in the sale and distribution of books and periodicals, whether obscene or not obscene. Under such circumstances, the bookseller will restrict and limit the books and periodicals entirely free of any possibility of contaminating matter, which might cause his summary arrest merely for having such items in his store. This type of censorship would result in preventing the sale and distribution of many books and periodicals which a court might finally determine not to be obscene, thereby imposing a censorship exceeding the boundaries which are prescribed by the limits beyond which the police power cannot operate."

When analyzed under the foregoing principles, it is very obvious that, as applied to businesses selling materials protected by the First Amendment, the corrupt business practices act is unconstitutional and violative of the First Amendment of the Constitution of the United States, and Article I, Section 9 of the Constitution of the State of Indiana in several different respects.

It is clear that, absent a conviction for distribution of obscene matter, the statute in question is patently unconstitutional.

Moreover, the statute is unconstitutional when applied to First Amendment related businesses, because it provides none of the required protections guaranteed by the First Amendment to the Constitution of the United States of America.

Because printed and pictorial matter is protected, one who sells such matter has the freedom to probe the outer limits of that which the community will tolerate. *Heller v. New York, supra, Memoirs v. Massachusetts,* 383 U.S. 413 (1966); *Jenkins v. Georgia,* 418 U.S. 153 (1974). The First Amendment allows the individual to challenge the thinking and the feelings of the community. *Memoirs v. Massachusetts, supra.*

Consequently, before an individual may be brought to trial as a result of an allegation that material which he has sold violates the First Amendment, he must be accorded an opportunity to show the judge that the material

is within the ambit of the First Amendment. This is required by statute. I.C. 35-30-10.1-1, *et seq.* See also *Heller v. New York, supra; Quanity of Books v. Kansas, supra; Marcus v. Search Warrant, supra.* Because petitioner has never been accorded such an opportunity, and could not be accorded such an opportunity under this particular statute, the statute, as applied and as written, is unconstitutional as applied to a First Amendment business.

Additionally, because the defendant has not been convicted of distribution of obscene matter, he submits that he cannot be constitutionally charged with racketeering. To allow this prosecution to continue will have a substantial "chilling effect" upon the exercise of First Amendment rights. Perhaps, necessarily, the statute defining obscenity is couched in vague terms. Individual standards may vary from area to area. I.C. 35-30-10.1-1, *et seq.* However, if one, who on two occasions four or five years apart, sells a particular book or material, or two similar books or materials which, in the eyes of some prosecutors, can subject him a charge of corrupt business influence, then clearly acceptable. The net result will be to reduce that which is available to adults to material only suitable for children. (Prohibited by *Butler v. Michigan,* 352 U.S. 380 (1957). The result will be a substantially "chilling effect" upon the exercise of constitutional liberties throughout the State of Indiana.

Under the Kubel doctrine, such an effect clearly would render the statute unconstitutional.

Specifications 3, 4, and 5 are based upon the failure of the statute to specifically inform the defendant of what he is charged.

Among the omissions of the pleading are specific mention of the works which the defendant allegedly sold, which the State believes to violate I.C. 35-30-10.1-1, *et seq.*

For an Information to state a public offense, the offense must be specifically charged in direct and unmistakable terms. If there is any reasonable doubt as to what offense, or if an offense is charged, that doubt must be resolved in favor of the defendant. *Belcher v. State,* 319 N.E.2d 658 (1974). Nothing may be charged by implication. *Hewett v. State,* 177 Ind. 1908; *Carter v. State,* 301 N.E.2d 524 (1973).

Further, the defendant must be informed specifically of the crime charge so that he may prepare a defense. *Loveless v. State,* 166 N.E.2d 864. In *Bruce v. State,* 104 N.E.2d 129, the Indiana Supreme Court said:

> "Where an indictment or affidavit is uncertain or ambiguous, or where its language admits of more than one construction, all reasonable doubts are to be resolved in favor of the accused and it will be construed most strongly against the State. *McNamara v. State* (1932), 203 Ind. 596, 181 N.E.2d 512; *Hunt v. State* (1927), 199 Ind. 550, 159 N.E. 149; *Littell v. State* (1893), 133 Ind. 577, 33 N.E.2d 417."

The principles set forth above are of constitutionally significant proportions. *Smith v. United States,* 360 U.S. 1. Of particultr significance, and particularly instructive, is the case of *Russell v. United States* (1962), 82 S.Ct. 1038. In *Russell,* the United States Supreme Court was faced with a defense claim that the charging papers were constitutionally insufficient and violated the defendant's rights as guaranteed by the Sixth Amendment to the Constitution of the United States of America. The court stated:

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> "In a number of cases, the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first whether the indictment, 'contains the elements of the offense intended to be charged, *and sufficiently appraises the defendant of what he must be prepared to meet,*' and secondly, 'in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre v. United States,* 157 U.S. 286; *Rosen v. United States,* 161 U.S. 29; *Hagner v. United States,* 285 U.S. 427; *Potter v. United States,* 155 U.S. 438; *Bartell v. United States,* 227 U.S. 427; *Berger v. United States,* 395 U.S. 78; *United States v. Debrow,* 346 U.S. 374."

The Court went on to say:

> "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms it is not sufficient that the indictment shall charge the offense in the same generic terms as that definition; but it must state the species and must ascent to particulars.' *United States v. Cruikshank,* 92 U.S. 542. An indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusation against him is defective although it may follow the language of the statute. *United States v. Simmons,* 96 U.S. 360. 'In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense to be punished.' *United States v. Carll,* 105 U.S. 611."

The Court, in *Russell,* stated that there is yet a third reason for the requirement of specificity. The Court said:

> "It has long been recognized that there is an important corollary purpose to be served by the requirement that an indictment set out 'the specific offense coming under the general description' with which the defendant is charged.' This purpose, as defined in *United States v. Cruikshank,* 92 U.S. 542, is 'to inform the Court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction, if one should be had.'"

The acts and intent that make up the crime must be set forth in the indictment and information with reasonable particularity of time, place, and circumstances. *United States v. Cruikshank, supra; Flying Eagle Publications, Inc. v. United States* (1960), 273 F.2d 799.

There are several reasons why specificity is required in criminal pleadings. These reasons are the requirement that the defendant knows specifically what the State claims he did. Additionally, it is required that the State be committed to a single theory of prosecution. As a corollary to the second reason, specificity is required that the State be committed to a single theory of prosecution. As a corollary to the second reason, specificity is required so that the Defendant may properly interpose the defense of double jeopardy to a subsequent charge.

It has been held that an information is too vague if the State could "change theories in midstream". Under the information here, the State clearly could change theories. For example, the State could claim that the predicate offenses were committed on August 16 and 17, 1982, and that the matter involved were "Debbie Does Dallas" and "Deep Throat." However, the State could change its theory at a subsequent time and claim that the predicate offenses were committed on August 19 and 20, 1982, and the works claimed to be obscene are "Playboy" and "Penthouse". Neither the defendant nor the Court has any way of knowing at this time the State's theory, and consequently, the State is not locked into such a theory. Similarly, the defendant could not, at a subsequent point, interpose double jeopardy. Because the defendant is charged with owning an adult bookstore, we may presume that he sold several different works each day encompassed by the time frame set out by the State. There would be locked in to a particular work, and consequently repeatedly charge the defendant under the same information, and the defendant would have no way of interposing his defense of double jeopardy. Thus, the information violates the Fifth

and Fourteenth Amendments to the Constitution of the United States of America.

Because the Information does not comply with the requirement of the statute, it is, of course, unlawfully vague.

The defendant has alleged in his Motion to Dismiss that the statute upon which the Information is based, that is I.C. 35-46-6-2, is unconstitutional, both on its face and as applied. In order to analyze this claim, the defendant would respectfully restate several fundamental propositions: a criminal statute is void for vagueness under the due process clause of the Fourteenth Amendment to the Constitution of the United States, if it fails to contain "ascertainable standards of guilt." *Winters v. New York* (1948), 333 U.S. 507; *State v. Kubel,* 172 N.E.2d 45; (Indiana citation).

The proper standard for determining if a criminal statute is vague is found in *Conolly v. General Construction Company* (1926), 269 U.S. 385, and *Grayned v. Rockford* (1972), 408 U.S. 104. In *Conolly v. General Construction Company, supra,* the United States Supreme Court said:

> "The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement consonant alike with ordinary notions of fair play and the solid rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The standard was further examined in *Grayned v. Rockford*, wherein it was explained:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the intendent dangers of arbitrary and discriminatory application.

I.C. 35-45-6-2 must be reviewed against this constitutional background. This statute provides:

(a) A person:

> (1) who has knowingly or intentionally received any proceeds *directly or indirectly derived* from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;
>
> (2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or
>
> (3) who is employed by or associated with an enterprise, and who knowingly or intentionally

> conducts or otherwise *participates in the activities of that enterprise* through a pattern of racketeering activity;
>
> commits corrupt business influence, a Class C Felony.

Racketeering activity, as defined by I.C. 35-45-6-1, includes, among other things, violations of any of the securities laws, violations of certain prohibitions against sale of obscene materials, promoting prostitution, promoting professional gambling, drug offenses, and the like.

The complexity of I.C. 35-46-6-2 is readily apparent. When the individual components of this statute are analyzed, its unconstitutionality as a whole is readily apparent.

Where there is ambiguity in a criminal statute, all doubts are resolved in favor of the defendant. *U.S. v. Bass* (1971), 404 U.S. 336.

Of primary import is the question of the required scienter. The statute appears to prohibit the doing or intentional receipt of proceeds, either directly or indirectly derived from a pattern of racketeering activity. The statute does not require, however, that the individual receiving those proceeds be "a member" of the racketeering organization. Thus, one who sells eggs to a restaurant known to be controlled by a racketeering activity, might render himself liable under this statute. This is especially so if, having saved the profits from the egg business, he buys a home or continues to operate his completely legal sole proprietorship. Similarly, one rendering unquestionably permissible services to a business accused of racketeering might find himself caught up under this statute.

Because men of ordinary intelligence could not see, at the time they do certain acts, that they might be violating the law, the statute is unconstitutional. Similarly, the clerk at a liquor store, who happens to unknowingly deliver to a state legislator a bribe, is employed or associated with an enterprise and does knowingly or intentionally participate in the activities of that enterprise through a patter of racketeering activity, even though he may have been unaware of what he was doing.

Clearly, as written, the scienter element under I.C. 35-45-6-2, is not limited to activity undertaken to facilitate illegal activities of a racketeering enterprise. This is important. A racketeering enterprise may engage in many activities, some of which are not, in and of themselves, illegal.

Therefore, the defendant submits that the statute fails to specify, with reasonable clarity, specifically what kinds of activity it prohibits and is therefore unconstitutionally vague. It is, of course, fundamental that no one may be required, at peril of life, liberty or property, to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids. *Lanzetta v. New Jersey* (1939), 306 U.S. 451.

The defendant has previously alluded to a second problem, which is that there is no requirement that an individual know that his actions are a patter of racketeering activity. As indicated, a seller, one who is a vendor to an enterprise which happens to be participating in racketeering activities, may be obtaining proceeds indirectly from said activities, and may find himself within the ambet of this statute.

The vague language of the statute thus may subject an individual to criminal sanctions for activities, the legality of which cannot be determined solely by the actor's conduct, but must be determined by factors which a person may be unaware of at the time. Such a statute violates due process. It lacks the ascertainable standards that give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *U.S. v. Harris* (1954), 347 U.S. 612. A second example is perhaps appropriate. As discussed elsewhere in this memorandum, I.C. 23-2-1, *et seq.*, provides several hundred different acts, the doing of which or the failure to do, might constitute a criminal violation.

One who is a secretary for a business which is systematically violating the technical aspects of I.C. 23-2-1, is deriving, indirectly, proceeds from a patter of racketeering activity. Should that individual choose to purchase a home, or perhaps rent an apartment (a lease is an interest in real property), might find themselves subjected to prosecution under this statute. Yet, until their arrest, their conduct would have been so innocent that they would have had no way of knowing, in any manner, that they were violating the law.

Unlike traditional forms of conspiracy, which require active participation, the racketeering statute provides mere employment or "association." Additionally, the statute fails in any manner to distinguish between the principles in the racketeering business and mere employees or associates. As such, the statute is unconstitutionally vague.

Finally, the term "association" does not lend itself to a sufficiently precise definition to be a permissible standard of criminal liability.

Friends are often associates. Clearly a secretary is associated with a business. Clearly a vendor may be associated with a business. All of those may have knowingly received proceeds directly or indirectly derived from a pattern of racketeering activity. Yet, their conduct may have been completely innocent.

Finally, the term "pattern of racketeering activity" is unconstitutionally vague. The statute defines "pattern of racketeering activity" as:

> "at least two incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents. However, the incidents are a pattern of racketeering activity only if at least one of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five years after a prior incident of racketeering activity.

When analyzed, it is obvious that this definition is not constitutionally acceptable. For example, does the phrase "two incidents of racketeering activity that have the same or similar intent" mean traditional criminal scienter, such as knowing or wilful, or the intent to accomplish a certain goal, *e.g.*, make money. The same problem exists with the phrase "result, accomplice, victim, or method of commission." What is a similar result? What is a similar accomplice? What is a similar victim?

One who sells a copy of "Hustler" on September 1, 1980, and who, on September 1, 1984, sells a second copy of "Hustler" may have been deemed to have violated I.C. 35-30-10.1-2 (Distribution of Obscene Matter). Those incidents, while seemingly isolated, are no so isolated as to be

outside the prohibition of the racketeering activity. While four years might seem to be isolated apparently in Indiana this is not the case. They would probably have the same or similar intent; i.e., to sell the magazine; the same or similar result, i.e., to derive proceeds from that sale; and the same or similar method of commission, i.e., handing the magazine across a counter to a customer and taking his money. Yet, the clerk who sold these two issues of "Hustler" would in no manner have any reason to think that he was elevated to the status of a senior member of a racketeering organization.

Additionally, because the statue purports to allow the trial of several allegations for which the Statute of Limitations may have passed, which are undefined, and for which one might not have notice that they were of sufficient seriousness as to be a Class C Felony, the statute denies due process and is unlawfully vague.

Respectfully submitted,

/s/ Richard Kammen

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(Certificate of Service omitted in printing.)

IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA)
) SS:
COUNTY OF HOWARD)

CAUSE NO. 2630

(Title omitted in printing.)

STATE'S REPLY MEMORANDUM TO DEFENDANT RONALD W. SAPPENFIELD'S MOTION TO DISMISS

The Indiana statute pertaining to criminal prosecutions for Racketeer Influenced and Corrupt Organizations (RICO) is I.C. 35-45-6-1 *et seq.* This criminal RICO statute is patterned after the Florida statute, Fla. Stat. Ann. § 895-01 (West Supp. 1982). Both the Indiana and Florida statutes are modeled upon the Federal Statute which is found at 18 U.S.C. § 1961 *et seq.* Very little Indiana case law exists on criminal RICO prosecutions, but the Florida and Federal case law are often on point.

Defendant Ronald W. Sappenfield has filed a Motion to Dismiss raising a number of constitutional and jurisdictional grounds. These will generally be considered in the same order they appear in his Motion. Attention will be given to whether any of these grounds are relevant to either the RICO statute, itself, or to I.C. 35-30-10.1-1 *et seq.* which governs to the sale or distribution of obscene materials, and which statute is a specified offense upon which a "pattern of racketeering activity" can be established.

I

Do either of these statutes violate the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America? No, they do not. The First Amendment pertains to freedom of speech and freedom of worship. Nothing in the criminal RICO statute deals with either of these liberties; therefore, if any objection under the First Amendment is to be made, it must arise under the obscenity statute. Indiana case law applies. The Indiana obscenity statute, I.C. 35-30-10.1-1 *et seq.*, has been upheld in *Ford v. State* (1979), — Ind.App. —, 394 N.E.2d 250 against First Amendment challenge.

Do either of the statutes violate the Fifth Amendment? No, they do not. The Federal RICO statute upon which Indiana's is based was upheld against both a Fifth and Eighth Amendment challenge in *U.S. v. Grande* (4th Cir.1980) 620 F.2d 1026; *Cert denied sub.nom. Berg v. U.S.* (1980), 449 U.S. 919. The obscenity statute was upheld against Fifth Amendment attack in *Riley v. State* (1979), 389 N.E.2d 367 and *Ford v. State, supra.*

Do either statutes violate the Sixth Amendment? No, they do not. Neither of these statutes deny any procedural or substantive right guaranteed to the accused by the Sixth Amendment. Since neither of these statutes pertain to "suspect classes" of individuals, it is difficult to justify any violation of the Fourteenth Amendment.

II

Do either of these statutes violate Article I, of the Constitution of the State of Indiana? No, they do not. Defendant has cited a large number of sections contained in Article I of the Indiana Constitution, none of which per-

tain, in any way, to the validity of a Criminal RICO prosecution, in a general way. It appears that the only possible application of Article I to this case, in any way whatsoever, could only arise under Section 9, Article I, which provides as follows:

> Section 9: Free speech and writing. No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, or any subject whatsoever: but for the abuse of that right, every person shall be responsible.

If the obscenity statute is not unconstitutional under the First Amendment of the U.S. Constitution, it is not unconstitutional under Article 1, Section 9 of the Indiana Constitution.

III

Is the criminal information herein unlawfully vague, or does it fail to state an offense with sufficient certainity? The answer to both questions is "No". The criminal informations are specific, not only as to the specific manners in which the Defendant engaged in conduct prescribed by the RICO statute, but also as to the specific acts of Defendant constituting the "pattern of racketeering activity". The Defendant is not correct in his general allegation that the facts contained in the charges fail to state a public offense.

IV

Are the informations duplicitous, or are the charges multiplicitas? Each information filed requires entirely different elements to be proven for conviction. Defendant's contention is spurious.

V

The Defendant's belief that a prior conviction for violation of I.C. 35-30-10.1-1 *et seq.* is a jurisdictional requirement for prosecution under the RICO statute is misplaced. I.C. 35-45-6-1(d) speaks for violations of any one of several listed statutes; there is no statutory requirement for convictions under the listed statutes.

VI

The Defendant feels that he should be afforded a preliminary determination of obscenity, apparently similar to the procedure outlined in I.C. 35-30-10.1-6, as a constitutional and jurisdictional requirement prior to prosecution. His argument is not well-taken.

I.C. 35-30-10.1-6 provides a preliminary procedure for determination of probable obscenity prior to arrest for violation of the obscenity statute. This section is triggered by the State if the questioned material is seized by the State, but by request of the Defendant if the material was obtained by purchase. In this instance, the material was acquired by purchase, and the Defendant has failed to request any such preliminary hearing, this waiving any right to it. (For a similar example involving a local ordinance containing such a preliminary hearing mechanism, see: *Massey v. City of Mishawaka* (19—), 378 N.E.2d 14.

The Defendant's reliance on these grounds is also misplaced for the simple reason that this case is *not* a prosecution under I.C. 35-30-10.1-1 *et seq.*, and Defendant was not arrested under that statute for these charges. This is a RICO prosecution. The most important constitutional difference is simply that this prosecution does not involve

prior restraint, which is the heart and soul of the First Amendment considerations for which the preliminary hearing is required, if seizure occurs under the obscenity statute.

———o———

CONCLUSION

The Defendant's Motion to Dismiss has no merit and should be denied.

Respectfully submitted,

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IN THE HOWARD SUPERIOR COURT
1985 TERM

STATE OF INDIANA)
) SS:
COUNTY OF HOWARD)

STATE OF INDIANA

vs.

RONALD W. SAPPENFIELD, CONNIE SAPPENFIELD, FANTASY ONE, INC. AND FANTASY TWO, INC.
CRIMINAL CAUSE NO 2630

(Filed September 18, 1985)

RULING ON MOTION TO DISMISS

The defendants are charged in Counts IV & VIII with violation of Indiana Code 35-45-6-2(3). It reads as follows:

> "a person: (3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits Corrupt Business Influence, a class C felony."

The defendants are charged with two (2) counts of Racketeering by the sale or distribution of obscene materials as defined in Indiana Code 35-30-10.1-2.

"Racketeering activity" is defined as follows:

> " . . . . to commit, to attempt to commit, or to conspire to commit a violation . . . . I.C. 35-30-10.1-2 . . . ."

> "Pattern of Racketeering activity means engaging in at least two (2) INCIDENTS (emphasis supplied) of racketeering activity . . . ."

The Constitution of the United States of America, by its First Amendment, offers protection to printed matters, movies and publications by the presumption that they are legitimate.

There must be a judicial determination, in an adversary proceeding, that these items are outside the scope of protection before a valid restraint may be imposed upon this fundamental right.

The defendant argues various points in support of their motion to dismiss and requests of this court a close scrutiny of this statute because of the possible "chilling effect" upon First Amendment rights.

The defendants in this cause have not been convicted of sale or distribution of obscene material. In fact, they have been charged with such an offense simultaneously herewith. The material alleged to have been sold or distributed has yet to be determined to be prohibited or protected. No trial has taken place for a jury to determine the "prevailing community standard".

The Racketeer Influence and Corrupt Organization Statute (R.I.C.O.) allows for the prosecutor to determine that the material violates current standards of the community and that merely purchasing on two (2) occasions fulfills the statutory requirement of "two incidents" of activity.

What constitutes "two incidents of *activity*"? Certainly it must be more than merely distributing or selling written material which has not been determined by a judicial proceeding to be unlawful.

In *Conolly v. General Construction Co.* (1926), 269 U.S. 385, it is stated

> "The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement consonant alike with ordinary notions of fair play and the solid rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Therefore, this Court finds the defendants' argument is well founded and this Court now finds that Indiana Code 35-45-6-2(3), as it applies to a violation of Indiana Code 35-30.10.51-2, is unconstitutionally vague and violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, and therefore grants the defendants' Motion to Dismiss as to Counts IV and VIII.

DATED THIS 18th DAY OF SEPTEMBER, 1985.

/s/ Dennis H. Parry
DENNIS H. PARRY
JUDGE, HOWARD SUPERIOR COURT

IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

STATE OF INDIANA,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	
	)	No.
RONALD W. SAPPENFIELD,	)	34A02-8603-CR-74
CONNIE SAPPENFIELD,	)	
FANTASY ONE, INC. and	)	
FANTASY TWO, INC.,	)	
	)	
Defendants-Appellees.	)	

APPEAL FROM THE HOWARD
SUPERIOR COURT DIVISION I

The Honorable Dennis H. Parry, Judge

Cause No. 2630

RATLIFF, C.J.

STATEMENT OF THE CASE

The State of Indiana appeals the dismissal of two informations charging the Sappenfields with violation of Indiana Code section 35-45-6-2, Indiana RICO statute. We reverse.

FACTS

As a result of an investigation into adult bookstores in Howard County, law enforcement officers purchased

several magazines at two stores allegedly owned or operated by Ronald and Connie Sappenfield. The magazines contained graphic photographs of heterosexual and homosexual activity. The Sappenfields were charged with violating Indiana's obscenity statute, Indiana Code section 35-49-1-1 *et seq.* Several Howard County residents examined the magazines and gave verified statements to the effect that the magazines were obscene. The Sappenfields have not been tried or convicted on any of the six allegations of distributing obscene matter. The prosecuting attorney also alleged a pattern of criminal activity arising out of the distribution of the same obscene matter pursuant to the Indiana Corrupt Business Influence statute (RICO), Indiana Code section 35-45-6-2.

On June 4, 1985, the Sappenfields moved to dismiss the two counts based on Indiana's RICO statute arguing RICO was unconstitutionally vague and violative of the 14th Amendment. On September 18, 1985, the trial court found that RICO could not be constitutionally applied to violations of Indiana's obscenity statute. Thereafter, the state perfected this appeal.

ISSUE

Whether the trial court erred in granting the Sappenfields' motion to dismiss in ruling that Indiana's RICO statute, I.C. § 35-45-6-2, as it applies to a violation of Indiana's obscenity statute, I.C. § 35-49-1-1 *et seq.*, is unconstitutionally vague and violative of the Due Process Clause of the Fourteenth Amendment.

DISCUSSION AND DECISION

The Indiana RICO statute, as enacted by the legislature in 1980, is essentially patterned after the federal anti-racketeering laws. *See Alvers v. State* (1986), Ind. App., 489 N.E.2d 83, *trans. denied;* 18 U.S.C.A. sections 1961-1968 (West 1984). Indiana Code section 35-45-6-2(a) states:

> "A person:
>
> (1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;
>
> (2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or
>
> (3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C felony."

"'Racketeering activity' means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation" of any of several enumerated predicate offenses, including violation of the obscenity statute. Indiana Code section 35-45-6-1. A "pattern of racketeering activity" means "engaging in at least two [2] incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission . . . ." I.C. § 35-45-6-1. The purpose of the federal RICO statute, after which the Indiana statute is

patterned, is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States* (1983), 464 U.S. 16, 26, 104 S. Ct. 296, 302, 78 L. Ed. 2d 17, 26.

Recently, in a factually similar case, the Indiana Supreme Court addressed the very issue before us today:

> "Before addressing the questions certified for interlocutary appeal, we must analyze the issue found by the Court of Appeals to be dispositive, namely whether the RICO/CRRA statutory scheme as it pertains to the predicate offense of obscenity violates the First and Fourteenth Amendments to the United States Constitution. That analysis begins with the proposition that an act of the legislature must be afforded a presumption of constitutionality. *Ruge v. Kovach* (1984), Ind., 467 N.E.2d 673; *Johnson v. St. Vincent Hospital, Inc.* (1980), 273 Ind. 374, 404 N.E. 2d 585."

4447 Corp. v. Goldsmith (filed March 2, 1987), Ind. No. 29S04-8703-CV-270, slip op. at 7.

> "Both the federal and Indiana RICO statutes delineate predicate offenses which underlie an allegation of a pattern of racketeering activity. The Indiana RICO statute as originally enacted included obscenity violations as a predicate offense. While the federal RICO statute did not initially contain the predicate offense of obscenity violations, in 1984 Congress amended the statute to include as a predicate offense 'any act . . . involving . . . dealing in obscene matter . . . which is chargeable under State law and punishable by imprisonment for more than one year.' 18 U.S.C.A. § 1961(1)(A) (West Supp. 1986). The statute was further amended to include 'any act which is indictable under . . . title 18, United States Code . . . sections 1461-1465 (relating to obscene matter).' 18 U.S.C.A. § 1961(1)(B) (West Supp. 1986).

"Given the clear legislative purpose in enacting these anti-racketeering statutes, that purpose, in the context of alleged obscenity violations, cannot be specifically construed to represent an attempt to restrain the sale or distribution of expressive materials. The legislative attack on racketeering activity is not, as appellants contend, merely a semantic device intended to circumvent well-established First Amendment doctrine.

"Obscenity does not come within the area of constitutionally protected speech or press. *Miller v. California* (1973), 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419; *Roth v. United States* (1957), 354 U.S. 476, 77 S. Ct. 1804, 1 L. Ed. 2d 1498. Our legislature, as has Congress, has determined that obscenity violations should be one of the underlying offenses which may constitute racketeering activity as defined in the RICO statute. We must take heed of that legislative intent.

> "We believe the overall purpose of the RICO statute is as applicable to obscenity violations as it is to the other enumerated predicate offenses which have no conceivable First Amendment ramifications."

4447 Corp., slip op. at 9-10.

> "We hold that the RICO/CRRA statutes as they pertain to the predicate offense of obscenity do not violate the First and Fourteenth Amendments of the United States Constitution."

Id. at 12. The Supreme Court went on to determine that prior convictions for the underlying offenses are not required to prove a pattern of racketeering activity under I.C. § 35-45-6-2.

In light of this recent supreme court decision, the State's position is clearly correct. Indiana's RICO statute is not unconstitutional as applied to the State's obscenity statute. Therefore, the trial court erred in granting the

Sappenfields' motion to dismiss regarding the counts based on the RICO statute.

We therefore reverse the judgment and remand for proceedings consistent with this opinion.

ROBERTSON, J. and NEAL, J., concur.

INDIANA COURT OF APPEALS'

Cause No. 34A02-8603-CR-74

STATE OF INDIANA -V- SAPPENFIELD, RONALD & CONNIE

You are hereby notified that the COURT OF APPEALS has on this day 5/15/87 APPELLEE'S PETITION FOR REHEARING DENIED. GEORGE B. HOFFMAN, JR., ACTING CHIEF JUDGE.

WITNESS my name and the seal of said Court, this 15th day of MAY, 1987.

/s/ Daniel Heiser

Clerk Supreme Court, Court of Appeals and Tax Court

INDIANA SUPREME COURT

STATE OF INDIANA -V- SAPPENFIELD, RONALD & CONNIE

You are hereby notified that the COURT OF APPEALS has on this day 8/17/87 APPELLEE'S PETITION TO TRANSFER IS HEREBY DENIED, WITHOUT OPINION. SHEPARD, C.J., DEBRULER, J. VOTES TO GRANT.

WITNESS my name and the seal of said Court, this 17th day of AUGUST, 1987.

/s/ Daniel Heiser

Clerk Supreme Court, Court of Appeals and Tax Court

Supreme Court, U.S.
FILED
MAY 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-470

In The
Supreme Court of the United States
October Term, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR PETITIONER FORT WAYNE BOOKS, INC.

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QUESTIONS PRESENTED

1. Is Indiana's civil RICO statute, authorizing pre-trial padlocking and post-trial forfeiture of entire communicative businesses solely on the basis of two or more obscenity offenses, facially unconstitutional under the First Amendment as a prior restraint on protected expression?

2. Do the forfeiture, padlocking and other sanctions of Indiana's civil RICO statute constitute an overly broad means of regulating the dissemination of obscenity in that they permanently restrain in the most sweeping fashion the prospective exercise of First Amendment rights?

3. Even in their operation upon materials alleged to be obscene, do the Indiana civil RICO statute's pre-trial sanctions of mass seizure and padlocking lack sufficient First Amendment procedural safeguards where they can be imposed based solely upon an *ex parte* probable cause determination of obscenity?

4. Do seizure, padlocking and forfeiture sanctions such as those upheld by the Indiana Supreme Court, violate the First Amendment by unduly chilling the exercise of protected expression?

LIST OF PARTIES

The following is a list of all parties of record in the Indiana Supreme Court in No. 87-470 in addition to those appearing in the caption of the present petition:

CINEMA BLUE OF FORT WAYNE, INC., EROTICA HOUSE BOOKSTORE, INC., 4447 CORPORATION, WORLD VIDEO SYSTEMS, ISSI THEATER CORPORATION, PLAZA ENTERTAINMENT CENTER and BURTON GORELICK appeared as appellants in the Indiana Supreme Court.

STEPHEN M. SIMS, Prosecuting Attorney for the 38th Judicial Circuit, and STEPHEN GOLDSMITH, Prosecuting Attorney for the 19th Judicial Circuit, appeared as appellees in the Indiana Supreme Court.

As previously indicated by letter to the Clerk of this Court, petitioner FORT WAYNE BOOKS, INC. believes that 4447 CORPORATION, WORLD VIDEO SYSTEMS, ISSI THEATER CORPORATION, CINEMA BLUE OF FORT WAYNE, INC., and EROTICA HOUSE BOOKSTORE, INC. have no interest in the outcome of this petition. Accordingly, pursuant to Supreme Court Rule 19.6, petitioner believes the respondents before this Court to be:

THE STATE OF INDIANA
STEPHEN M. SIMS
STEPHEN GOLDSMITH
PLAZA ENTERTAINMENT CENTER
BURTON GORELICK

* There are no entities to list pursuant to this Court's Rule 28.1.

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No. 87-470

In The
Supreme Court of the United States
October Term, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR PETITIONER FORT WAYNE BOOKS, INC.

OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported as *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind.

1987) and is printed at Cert. App.[1] 1-22; the order and opinion denying rehearing are reported at 509 N.E.2d 174 (Ind. 1987) and are printed at Cert. App. 104-112. The opinion of the Indiana Court of Appeals is reported as *4447 Corporation v. Goldsmith*, 479 N.E.2d 578 (Ind. App. 1985) and is printed at Cert. App. 28-98.

JURISDICTION

The Supreme Court of Indiana entered its opinion in this matter on March 2, 1987 and denied rehearing on June 18, 1987. The certiorari petition herein was filed within 90 days of the latter date.

The Indiana Supreme Court's opinion constitutes a final judgment in a civil case upholding the constitutionality of various pre-trial restraints on constitutionally protected expression imposed pursuant to Indiana's state RICO law. The opinion also upheld against constitutional attack the post-trial forfeiture sanctions authorized by that same law. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 2101(c).

[1] As used herein, the abbreviation "Cert. App." will refer to the Appendix to Petition for a Writ of Certiorari filed separately but contemporaneously with the Petition for Writ of Certiorari. The abbreviation "App." will refer to the appendices to this brief. The abbreviation "J.A." will refer to the Joint Appendix. The abbreviation "F.W.R." will refer to the separate trial court record prepared in the Fort Wayne litigation (*Sims, et al. v. Fort Wayne Books, et al.*). The abbreviation "I.R." will refer to the trial court record in the consolidated case from Indianapolis (*Goldsmith v. 4447 Corp., et al.*).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 1

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Amendment 14, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

PROVISIONS FROM INDIANA CODE

The pertinent provisions of the Indiana Code are presented in Appendix F accompanying the certiorari petition (Cert. App. 113-125), including: IC §§ 34-4-30.5-1 through 34-4-30.5-6 (Indiana's civil RICO statute—Cert. App. 113-118); §§ 35-45-6-1 and 35-45-6-2 (Indiana's criminal RICO statute—Cert. App. 118-120); and §§ 35-49-1-1 through 35-49-1-10, § 35-49-2-1, and §§ 35-49-3-1 through 35-49-3-4 (Indiana's criminal provisions defining and punishing obscenity violations—Cert. App. 120-125). The civil and criminal RICO statutes are also reproduced in Appendix A of this Brief (App. 1-8).

STATEMENT OF THE CASE

Introduction

This case involves the question whether the seizure, padlocking and forfeiture sanctions authorized by a state's RICO statutes are constitutionally permissible as applied to those whose only alleged offenses involve the sale or exhibition of two or more allegedly obscene items.

A single judgment was rendered below by the Indiana Supreme Court in two cases consolidated on appeal, one involving a civil RICO action against three adult bookstores in Indianapolis[2] and one involving a civil RICO action against three adult bookstores in Fort Wayne.[3] The only petitioner before this Court is Fort Wayne Books, Inc., the owner of one of the three bookstores in the Fort Wayne litigation.

Facts

Petitioner Fort Wayne Books, Inc. operates Fort Wayne Books, an adult bookstore in Indiana. From approximately April of 1979 to March 19, 1984, petitioner's bookstore offered for sale thousands of different sexually-oriented books, magazines, motion picture films and videotapes, all presumptively entitled to constitutional protection. The store also operated numerous motion picture viewing booths wherein a customer could privately view any of a number of different motion picture films or videotapes.

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2 *Goldsmith v. 4447 Corporation, et al.*, Marion County Cir. Ct. #83-1788 (Hamilton County Cir. Ct. #83-346 after change of venue).

3 *Sims, et al. v. Fort Wayne Books, Inc., et al.*, Allen County Cir. Ct. #84-446.

On March 19, 1984, respondents Stephen M. Sims and the State of Indiana filed a complaint (J.A. 7-49) against petitioner and others in the Circuit Court of Allen County, Indiana, charging them with violation of Indiana's state civil RICO statute (IC § 34-4-30.5-1 *et seq.*) and seeking the full range of statutory sanctions including license revocation, corporate dissolution, and forfeiture not only of all of petitioner's assets, but also of assets not owned by the corporation (such as rented realty) used in alleged violation of the statute. (J.A. 46-49.) The only predicate offenses asserted in support of the civil RICO claim were alleged violations of Indiana's obscenity statutes.

On that same date, these respondents filed a "Verified Petition for Seizure of Property Subject to Forfeiture" against petitioner and the other defendants, seeking an *ex parte* order authorizing respondents to padlock petitioner's bookstore and two other bookstores and to seize all of their inventory, equipment and corporate assets. (J.A. 51-78.) This petition was supported by a police officer's probable cause affidavits alleging that the corporate owners of these bookstores were part of a single "enterprise" and that they and their employees had been convicted of certain obscenity offenses[4] which, according to the

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4 The officer's affidavit and supporting exhibits showed convictions of petitioner Fort Wayne Books, Inc. in three cases brought under the former obscenity statute (§ IC 35-10.1-2) and seven of employees under that same former statute, most of which were the result of negotiated pleas. The officer's affidavit alleged no convictions of the corporation under the new obscenity statute (the only one made punishable as a predicate RICO offense) but alleged two cases involving employees who entered into negotiated pleas under the new obscenity statute.

(Continued on following page)

officer, constituted valid "predicate offenses" triggering application of the RICO statute.[5] The officer also alleged that he had personally viewed a number of motion picture films and videotapes exhibited in petitioner's store and had concluded that they were legally obscene. The officer made similar allegations as to the other two bookstores named in the complaint.

The same day, March 19, 1984, an *ex parte* hearing was held on the state's forfeiture petition (F.W.R. 285-317) without any notice of the hearing to the defendants.

Following the *ex parte* hearing, the trial court immediately concluded that there was probable cause to believe that each of the defendants had committed two or more violations of the state's obscenity laws in violation of the civil RICO statute. Accordingly, the trial court, without any notice to petitioner or the other affected businesses, issued an order commanding the immediate padlocking of

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(Continued from previous page)

See F.W.R. 43 and 45. It is not clear from the exhibits attached in support of the officer's affidavit that the conduct in the latter two cases occurred at petitioner's bookstore. *See* F.W.R. 96, 98, 164 and 166 (listing a different street address and different store name as the source of the conduct which resulted in the negotiated pleas). Moreover, the two cases involving convictions under the current obscenity statute involved only conduct which occurred *before* the 1983 amendment to the RICO statute making violations of the new obscenity statute a predicate RICO offense.

[5] Petitioner does not agree that *any* of the convictions alleged in the officer's affidavit constitute valid predicate offenses under Indiana's RICO statute. However, resolution of this issue will involve complicated issues of statutory construction not here relevant. Of course, since the seizure application was made *ex parte*, there was no opportunity for petitioner to force the state to prove that the requisite predicate offenses had in fact been committed.

all three bookstores and seizure of their entire contents. (J.A. 79-83.) The items alleged to be obscene comprised only a tiny fraction of the items actually seized.

On that same day (March 19, 1984), the authorities padlocked all three bookstores and denied access to them by store employees and the public alike. No trial date was set, nor has one ever been set in this case.

On March 23, 1984, petitioner filed a motion in the trial court to vacate the *ex parte* seizure and padlocking order (F.W.R. 327-334), asserting that the *ex parte* order lacked the numerous procedural safeguards required by the First Amendment and also, in any event, was an unconstitutional prior restraint of First Amendment rights.[6] On March 29, 1984, a hearing was held on petitioner's motion to vacate the *ex parte* order and the court denied the motion.[7] (F.W.R. 524.)

The following day, after the bookstores had already been padlocked, the authorities, again without notice, commenced removal of the entire contents of the three establishments, including tens of thousands of books, magazines and films, as well as items such as film projectors, cash registers and bookracks. (See Cert. App. 36 and F.W.R. 548.) As mentioned above, the sole basis for these mass seizures was the allegation of prior obscenity offenses. No judicial determination of obscenity or even probable obscenity of the seized media preceded its confiscation, nor was either alleged.

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[6] An extensive Memorandum of Points and Authorities in support of the motion to vacate appears at F.W.R. 425-468 and additional exhibits thereto appear at F.W.R. 335-416.

[7] A transcript of this hearing is reproduced at F.W.R. 478-529.

On April 3, 1984 the defendants filed an Emergency Motion for Inventory of Property Removed and/or for Return of Property. (F.W.R. 548-551.) The next day, partial inventories were filed by the state (F.W.R. 626-635) and the motion was denied by the trial court (F.W.R. 625).

On April 3 and April 12, 1984, the defendants filed with the trial court a petition and a supplemental petition to certify its interim orders for interlocutory appeal (F.W.R. 552 and 650). On April 18, 1984 the trial court granted the request for certification (F.W.R. 697 and 700) but denied a motion to stay its interim injunctive order pending the interlocutory appeal. (F.W.R. 697 and 701.)

On April 27, 1984, the corporate defendants, including petitioner, perfected their interlocutory appeal and simultaneously filed in the Indiana Court of Appeals an emergency stay application, designated as Motion For Stay (Modification) Of Interlocutory Injunction Without Bond Pending Appeal. The stay application asserted, *inter alia*, that under *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977), a stay pending appeal was mandatory because state law did not provide for immediate appellate review of the interim *ex parte* closure order. Petitioner's other substantive and procedural challenges were presented in the stay application as well as in its briefs filed on the merits of the interlocutory appeal.

Despite repeated written and oral requests by petitioner and the other appellants for immediate consideration of their stay application pending the interlocutory

appeal,[8] there had still been no appellate ruling on the stay application as of March 26, 1985, nearly a full year after it was filed in the Court of Appeals. Throughout that time, all three bookstores remained sealed and padlocked by virtue of the trial court's unreviewed *ex parte* closure order.

On March 26, 1985, petitioner and the other bookstore owners filed an application to Circuit Justice Stevens of

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[8] On May 2, 1984, five days after petitioner filed its application for stay in the Court of Appeals, respondent Sims filed a Verified Petition For Transfer Of Case to the Supreme Court of Indiana. Under Indiana law, the immediate effect of the filing of such a petition is to divest the Court of Appeals of jurisdiction over both the stay application and the merits of the interlocutory appeal. This procedural device placed the issues relevant to the stay squarely before the Supreme Court of Indiana. Nonetheless, after nearly three months, the Indiana Supreme Court denied the petition for transfer on July 17, 1984 and expressly remanded the stay application back to the Court of Appeals without any decision.

Following the July 17th remand, petitioner expected a prompt consideration of its stay application because, on the same day the Petition For Transfer was filed (May 2, 1984), the Court of Appeals transferred the Fort Wayne case to the division of the Court of Appeals which had issued a similar stay in the Indianapolis case. When no action had yet been taken by the Court of Appeals on the stay application by September 23, 1984, petitioner filed another document in the Court of Appeals entitled "Request For Expeditious Ruling On Motion For Stay (Modification) . . . ." Respondent Sims filed papers on October 10, 1984 urging the Court to defer action on the stay request pending ultimate resolution of the appeal.

In addition to the foregoing efforts of petitioner to secure appellate consideration of its stay application, its counsel also made repeated calls to the Clerk of the Court of Appeals and its Commissioner advising them of the need for prompt consideration of the stay application. Based on those calls, counsel for petitioner were continually, but erroneously, led to believe that action on the stay application was, in all likelihood, imminent.

this Court for a stay of the *ex parte* interim injunctive order.[9] Justice Stevens ordered the State to respond to petitioner's stay application by April 4, 1985.

On April 4, 1985, the Indiana Court of Appeals granted the year-old stay application, rendering moot the application presented to Justice Stevens. Thereafter the padlocks were removed and the three bookstores were allowed to resume operations pending the outcome of the appeal.

Petitioner's case was consolidated in the Indiana Court of Appeals with a similar state RICO action filed against an unrelated alleged "enterprise" consisting of three bookstores in Indianapolis.[10] The primary differences between the two cases are: (1) in the Indianapolis case there were no allegations of *any* obscenity *convictions*. Rather, that RICO complaint was based exclusively upon probable cause allegations of current obscenity violations at two of the three stores (Cert. App. 7-8); (2) in the Indianapolis case, one of the three stores had not yet opened at the time the court issued its *ex parte* order and there was no allegation that its premises had ever been used to violate *any* obscenity law; (3) the unopened Indianapolis store was ordered padlocked and sealed simply upon the allegation that other stores allegedly owned by the same "enterprise" were believed to be violating the obscenity law; (4) the state enjoined the landlord of the yet-to-open Indianapolis store from reletting the padlocked premises to unrelated new tenants (see Amicus Brief of Burke

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[9] *Wayne Books, et al. v. Indiana, et al.*, U.S. Sup.Ct. D[illegible] A-734.

[10] *Goldsmith v. 4447 Corporation, et al., supra.*

Mendenhall, filed in support of Petition for Writ of Certiorari); (5) while the Fort Wayne facts illustrate extreme delay in judicial review at the appellate level, the Indianapolis case involved extreme delay in judicial review of the *ex parte* padlocking order at the trial court level.[11]

On June 12, 1985, the Indiana Court of Appeals issued a 2-1 decision on the consolidated interlocutory appeal. (Cert. App. 29-98.) Initially the Court summarized the problem as follows:

> "Without so much as an allegation of obscenity as to most of the bookstores' inventories of films and publications, the state ultimately seeks permanent revocation of their business licenses as well as forfeitures of these communicative materials and instrumentalities. The impact of such remedies upon the availability of these materials is direct and undeniable—the state has effectively suppressed them prior to distribution. The suppression of entire bookstores inevitably affects protected as well as any unprotected expression . . . ." (Cert. App. 43-44.)

Relying on extensive state and federal precedent, the Court of Appeals found both the pre-trial sanctions of seizure and padlocking and the various post-trial sanctions of forfeiture, license revocation, etc., to be facially unconstitutional as impermissible prior restraints on the distribution of materials not even alleged to be obscene. (Cert. App. 44-58.) The court demonstrated that the statute violates a wide variety of procedural safeguards required by this Court's prior decisions "even if the statutes' application were limited to materials alleged to be

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[11] The procedural facts of the Indianapolis case are set forth chronologically at J.A. 100-102.

obscene." (Cert. App. 64.) Among other things, the Court of Appeals observed:

> "First, the statutory scheme assigns the state no burden of proof regarding obscenity, beyond the requirement that plaintiffs adduce two predicate offenses. Far from requiring that the state affirmatively demonstrate the obscenity of all materials subject to seizure and forfeiture, *the RICO/CRRA statutes do not even permit the defendants to litigate the issue* and to establish the nonobscenity of most of the seized books, films, and magazines." (Emphasis added.) (Cert. App. 67.)

The Court of Appeals concluded that the statute could not be saved by a narrowing construction restricting forfeiture to materials actually proved obscene. The court concluded that the statutes' lack of procedural safeguards prevented such a limiting construction, and in any event, such a construction "would be an unnecessarily tortuous exercise" which would be "anomalous in relation to the overall operation of the RICO/CRRA statutes" and "would add nothing to the prosecutorial tools now afforded by our criminal obscenity statute." (Cert. App. 69.) The Court of Appeals stated that it would "not ascribe to the legislative intent such an absurd result." (Cert. App. 69.)

The Indiana Supreme Court reversed the decision of the Court of Appeals. (Cert. App. 1-22.) In a split opinion, the majority concluded that a statute authorizing sanctions against protected expression need not be measured by First Amendment standards if the legislative purpose was non-censorial. (Cert. App. 13-15.) Concluding that the statutory purpose for including obscenity as a predicate RICO offense was unrelated to a desire to suppress speech, the court held that the Court of Appeals had erred in subjecting the statute to First Amendment prior restraint analysis. Dissenting, Justice DeBruler disagreed with the underlying premise of the majority opinion, choosing to rely instead on this Court's holding most recently articulated in *Schad v. Burough of Mt. Ephraim*, 452 U.S. 61, 68 (1981),) that "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised [by the state]."

The majority also rendered two significant constructions of the statute. First, it held that the state need not allege *any* prior obscenity convictions but need only make probable cause allegations of unproved obscenity violations. (Cert. App. 15-16.) Second, in upholding the Indianapolis order sealing the one location which had never been open, the court necessarily construed the statute so that two or more obscenity violations at any store in a chain of stores justifies closure orders directed to any or all of the stores in the chain.

Finally, the majority opinion rejected petitioner's claim that the *ex parte* seizure and padlocking procedures authorized by the statute lacked adequate procedural safeguards required by the First Amendment. (Cert. App. 17-19.) The majority entirely ignored petitioner's contention that mass seizures of media materials can never be conducted on the basis of *ex parte* probable cause determinations.

The court's opinion addressed only one of petitioner's procedural arguments—the contention that the interim

restraints are void because they are of indefinite duration and that the statutory scheme fails to require a final trial court determination of obscenity within a *fixed* or *specified* brief period. The court noted that the statute does not require trial to be set within any specified period of time after execution of the seizure order. However, rather than reading into the statute a specific time limit for bringing the case to trial, the court construed the statute merely to require trial "within a 'reasonable' time." (Cert. App. 18.)

The three bookstores involved in the Indianapolis litigation have ceased doing business as have all of the Fort Wayne bookstores except for petitioner, Fort Wayne Books, Inc. However, the Indianapolis case is still pending as the authorities continue to seek a final order of forfeiture against the landlord of the abated bookstore. (His premises have remained closed under court order since they were vacated by his former tenants, respondents Gorelick and Plaza Entertainment Center.)

There has been no trial in the present Fort Wayne action nor has a trial date been set.

Petitioner's store has been allowed to remain open pending the outcome of this Court's decision. If the state's actions are upheld, petitioner's store will be padlocked again pending trial.

SUMMARY OF ARGUMENT

The Indiana civil RICO statute as applied in this case represents a stark challenge to the security of First Amendment freedoms and an affront to virtually every fundamental principle of First Amendment jurisprudence since *Near v. Minnesota,* 283 U.S. 697 (1931). Solely for alleged obscenity offenses, the state padlocked three bookstores for more than a year and seized property including entire inventories of presumptively-protected materials. As the Indiana Court of Appeals concluded in facially invalidating the statute, this case "vividly illustrates the rationale for longstanding hostility to any system of prior restraints under our Constitution." *4447 Corporation v. Goldsmith,* 479 N.E.2d 578, 592 (Ind. App. 1985).

In its opinion upholding both the devastating pretrial and post-trial civil RICO sanctions, the Indiana Supreme Court rejected the Court of Appeals' conclusion that the entire statutory scheme violates the First Amendment as a prior restraint. The Supreme Court held that the post-trial forfeiture sanctions are immune from First Amendment challenge as a prior restraint because there was no proof of a censorious legislative purpose (Cert. App. 10-15), flatly contradicting the recent unanimous position of this Court in *Arcara v. Cloud Books, Inc.,* — U.S. —, 106 S.Ct. 3172, 3177 (1986), that the usual strict scrutiny of the First Amendment applies "where it was con-

duct with a significant expressive element that drew the legal remedy in the first place." A majority of this Court, as represented by Justice O'Connor's concurring opinion, indicated that in contrast to the state action upheld in *Arcara* (the closure of a bookstore predicated upon completely non-expressive conduct), a different result would obtain in this case. The use of a nuisance statute (or simply to apply a different label, a "racketeering" statute) "as a pretext for closing down a book store because it sold indecent books . . . would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review," *i.e.*, the extremely strict scrutiny of the prior restraint doctrine. 106 S.Ct. at 3178 (Justice O'Connor, concurring).

This Court has continually reaffirmed that resort to talismanic labels in no way avoids the strictures of the constitutional guarantees of free speech and press. *See New York Times v. Sullivan*, 376 U.S. 254, 268 (1964). Whether the State labels an obscenity offense a "nuisance" or "racketeering," the same First Amendment principles prohibit the closure or forfeiture of an entire communicative business solely on grounds of unprotected expression. Indeed, if these sanctions were upheld in their application to obscenity, no principled distinction would bar the inclusion of other unprotected speech (*e.g.*, defamation, false advertising, etc.) as a predicate offense triggering RICO or similar prior restraint sanctions.

Concluding that this application of the RICO statute did not constitute a prior restraint, the Indiana Supreme Court also rejected the notion that the pre-trial seizure and padlocking already imposed in this case violated numerous procedural safeguards required by a host of this Court's prior decisions. However, because the Indiana Supreme Court's opinion has now squarely held that the post-trial forfeiture sanctions are impervious to First Amendment attack, this case cannot be resolved by addressing only the pre-trial procedural issues. If left undisturbed by this Court, the ruling below will have an immediate and devastating impact, not only in Indiana but nationwide, curtailing public access to an entire genre of constitutionally-protected, non-obscene erotic expression. Accordingly, it is imperative that this Court consider the prior restraint aspects of both the pre-trial and post-trial statutory sanctions.

The Indiana Supreme Court's rejection of the prior restraint argument was not only inconsistent with the standard of review mandated by *Arcara*, *supra*, and many other similar cases, it also was entirely inconsistent with this Court's landmark decision in *Near v. Minnesota*, *supra*, and numerous subsequent cases involving obscenity regulations this Court has found to be impermissible prior restraints.

In essence, the court approved a statutory scheme which provides that a state may restrain all future ex-

pression by a bookstore or other communicative enterprise because of two prior speech-related violations. *Near* held that just such a broad restraint of future expression premised upon prior speech violations "is of the essence of censorship." 283 U.S. at 713.

The opinion below also contravenes numerous post-*Near* decisions by this Court striking down overbroad means of regulating obscenity. These include *Marcus v. Search Warrants*, 367 U.S. 717 (1961); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Heller v. New York*, 413 U.S. 483 (1973); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968); and *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980). All of these cases were premised upon the fundamental belief that measures designed to eliminate obscenity should not be so sweeping as to restrain the dissemination of protected speech at the same location; yet this is precisely what Indiana's civil RICO statute is designed to accomplish.

The court's opinion is also inconsistent with more than 40 opinions of state and lower federal courts which have found state laws authorizing license revocation or padlocking of premises where prior obscenity violations have occurred to be impermissible prior restraints. All of those decisions explicitly or implicitly rejected the notion that such broad restraints of future presumptively-protected speech can be constitutionally permissible forms of punishment for past speech violations.

For all the reasons above, both the pre-trial and post-trial sanctions authorized by this statute should be found facially invalid for overbreadth and as impermissible prior restraints. Further underscoring the statutory scheme's fundamentally flawed nature is the fact that the RICO statute violates not only the substantive rule of *Near* and its progeny, but virtually every procedural safeguard limiting the regulation of unprotected speech.

This Court's numerous prior opinions in *Marcus v. Search Warrants*, 367 U.S. 717 (1961), *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), *Heller v. New York*, 413 U.S. 483, 491 (1973), and related cases have squarely held that any mass pre-trial seizure of the entire contents of a bookstore violates the First Amendment in the absence of a prior adversary hearing designed to focus searchingly on the obscenity of *each* item sought to be seized and thereby removed from public access.

Similarly, the seizure of *all* copies of even an *allegedly obscene* item cannot be based on a mere probable cause standard consistent with the public's right of access to presumptively-protected material. *See Heller v. New York, supra.* The First Amendment rights of public and bookseller alike have always been one of the "particularly important interests" which merit protection by, at the very least, the "clear and convincing evidence" standard discussed in *California ex rel. Cooper v. Mitchell Brothers*, 454 U.S. 90, 93 (1981). Any lesser standard would be in-

consistent with the requirement that persons desiring to engage in communication presumptively protected by the First Amendment have sufficient "breathing space" in order to prevent the chilling effect of self-censorship. *See, e.g., Hustler Magazine v. Falwell,* — U.S. —, 108 S.Ct. 876, 880 (1988); *New York Times Co. v. Sullivan,* 376 U.S. 254, 272 (1964).

Moreover, there is absolutely no guarantee under Indiana law of prompt *appellate* review of mass seizures such as these, as constitutionally required under prior decisions of this Court. *See, e.g., National Socialist Party of America v. Village of Skokie,* 432 U.S. 43 (1977). The delay of over one year before the Indiana Court of Appeals acted on petitioner's promptly filed stay application vividly demonstrates the need for this constitutional requirement.

The complete failure of the civil RICO statute to comply with any of these procedural safeguards of First Amendment rights only serves to dramatize the inappropriateness of this statutory scheme as a response to alleged obscenity offenses. Hardly an example of the "sensitive tools" which must be employed to separate protected from unprotected speech (*Speiser v. Randall,* 357 U.S. 513, 525 (1958)), the RICO statute inevitably effects a prior restraint upon *vast* quantities of presumptively-protected materials as well as the entire on-going opera-

tion of the bookstore, theater, or other communicative business.

If upheld by this Court, the RICO Act's draconian padlocking and forfeiture provisions will also result in self-censorship of enormous quantities of constitutionally-protected material by virtue of the statute's chilling effect. At the risk of an institutional "death sentence" merely for two instances of unprotected speech, booksellers, video store and theater operators have little choice but to refrain entirely from disseminating a wide variety of sexually-oriented materials which in fact are non-obscene, and to which the public has a constitutional right of access. The insidious chilling effect of this statute on others will be no less damaging to the freedoms of speech and press than the actual padlock on the door. Both as a direct prior restraint and for its indirect chilling effect, therefore, this statute is fatally overbroad in its impact upon expression fully protected by the First Amendment.

For all these reasons, the statute should be declared invalid under the First Amendment, and the judgment of the Indiana Supreme Court should be reversed.

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ARGUMENT

I

WHERE THE ONLY PREDICATE OFFENSES ARE OBSCENITY VIOLATIONS, INDIANA'S CIVIL RICO STATUTE VIOLATES THE FIRST AMENDMENT ON ITS FACE, BOTH AS A PRIOR RESTRAINT AND AS AN OVERLY BROAD STATUTE WHICH RESTRAINS A SUBSTANTIAL AMOUNT OF CONS "U-TIONALLY-PROTECTED SPEECH

A. Standard Of Review.

Although the Indiana Court of Appeals found this statute to be a classic prior restraint in violation of the First Amendment, the Indiana Supreme Court concluded that the legislative purpose was not censorious in including obscenity as a predicate offense in its RICO statute (Cert. App. 11-12), and that the statute was accordingly immune from First Amendment scrutiny. (Cert. App. 11-15.) That conclusion is clearly at odds with this Court's prior decisions. A censorious legislative intent "is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592 (1983). *Accord: Arkansas Writers' Project, Inc. v. Ragland*, — U.S. —, —, 107 S.Ct. 1722, 1727 (1987). "[E]ven regulations aimed at proper governmental concerns can restrict unduly the

exercise of rights protected by the First Amendment." *Minneapolis Star, supra*, 460 U.S. at 592.

Rather, it is the "operation and effect of the statute" which determines the applicable standard of review. *Near v. Minnesota*, 283 U.S. 697, 708-709 and 713 (1931). *Accord Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957): "The judicial angle of vision in testing the validity of [an obscenity-injunction] statute . . . is 'the operation and effect of the statute in substance' . . . ." (Citing *Near, supra*), 354 U.S. at 441.[12]

The operation and effect of Indiana's civil RICO statute is dramatically demonstrated by the opinion below. As construed by the Indiana Supreme Court, the statute goes into *operation* simply upon allegations that there were two or more obscenity violations committed by any store in a chain of stores under common ownership. Nothing other than these two obscenity violations need be shown to trigger the entire panoply of draconian sanctions.[13]

The *effect* of Indiana's civil RICO statute is equally clear. Based on two prior obscenity violations, the stat-

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[12] "In every case, therefore, where legislative abridgment of [First Amendment] rights is asserted, the courts should be astute to examine the *effect* of the challenged legislation." (Emphasis added.) *Schneider v. State*, 308 U.S. 147, 161 (1939).

[13] As construed by the Indiana Supreme Court, prior convictions are not even necessary. (Cert. App. 16).

ute authorizes the pre-trial padlocking of every store in a chain of stores under common ownership, thereby totally restraining every type of speech activity at the affected locations pending trial. If, for example, a national chain of bookstores, record stores or video stores had been found to have sold or rented two or more copies of a videotape or a leading men's magazine believed to be obscene, the statute, as construed by the Indiana Supreme Court, would authorize the padlocking of every bookstore, record store or video store in that "enterprise" as well as the seizure of the entire inventories and the neutral instrumentalities of the businesses pending trial.

If the two or more allegedly obscene materials are civilly adjudged obscene at trial, (1) the defendants must forfeit all of the seized assets (*i.e.*, every bookstore, video store, etc. involved becomes the property of the state);[14] (2) the defendants are permanently enjoined from engaging in the same type of business enterprise as the one which was forfeited to the state;[15] (3) the defendants must divest themselves of any interest in the bookstore, video

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[14] IC § 34-4-30.5-3(a) authorizes the forfeiture of all property "used in the course of, derived from, or realized through, conduct in violation of [the RICO statute]." Subdivision (b) thereof authorizes the seizure of all property subject to forfeiture under subdivision (a). The opinion below upheld the seizure of the entire contents of all the affected bookstores and thereby necessarily construed the statute as authorizing forfeiture of the *entire* business, not just obscene materials or the proceeds derived from their sale.

[15] IC § 34-4-30.5-2(2).

store, etc.;[16] (4) the enterprise must be dissolved;[17] and (5) any applicable business licenses and corporate charters are revoked.[18] In sum, the owner of a bookstore, newspaper or video store is absolutely restrained, solely on the basis of past incidents of unprotected speech, by one of the most virulent regimes of censorship ever adopted in this nation.[19]

The virulence of this form of censorship is concretely demonstrated not only by the seizure of the entire contents of all three Fort Wayne stores for the purpose of subsequent forfeiture, but also by the devastating order of forfeiture already imposed under the parallel provisions of the federal RICO statute. In *United States v. Pryba*, 674 F.Supp. 1504 (E.D.Va. 1987), the first federal RICO/obscenity prosecution, the trial court upheld the federal RICO statute's forfeiture provisions against a motion to dismiss. Following the defendants' convictions, the court imposed a draconian order of forfeiture (a copy of which is appended to this brief as Appendix B at App. 9-13). Pursuant to this order of forfeiture, the Government obtained the forfeiture of all assets of the defendant corporations and video stores, including all media materials, real estate, bank accounts, machinery, equipment, furniture, and even the defendants' automobiles.

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[16] IC § 34-4-30.5-2(1).

[17] IC § 34-4-30.5-2(3).

[18] IC § 34-4-30.5-2(4) and IC § 34-4-30.5-2(5).

[19] Surely if a foreign government had adopted a law which permanently silenced all those found to have engaged in any prior unprotected expression, few of us would hesitate to describe such a regime as the very embodiment of oppressive governmental suppression and censorship.

Clearly, statutes of this type cannot help but have a tremendous repressive impact in restraining presumptively-protected expression.

The devastating effect of this statute upon protected expression mandates its strict scrutiny by this Court no matter what "legislative purpose" the state may offer in its support. As this Court stated in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981): "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed."

B. As Applied To The Predicate Offense Of Obscenity, Both The Pre-Trial And Post-Trial Sanctions Of Indiana's Civil RICO Statute Are Facially Unconstitutional As Impermissible Prior Restraints.

In *Near v. Minnesota*, 283 U.S. 697 (1931), this Court held that a publisher which had been found guilty of publishing nine different scandalous and defamatory editions of a newspaper and who had also been found to have "regularly and customarily" published scandalous and defamatory articles (*id.* at 706) could not be enjoined from future publication, as to do so would effect a prior restraint upon future presumptively protected expression. As this Court summarized *Near* in the subsequent case of *Kingsley Books v. Brown*, 354 U.S. 436 (1957):

> "Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive. In the language of Mr. Chief Justice Hughes, 'this is of the essence of censorship.' 283 U.S. at p. 713. As such, it was unconstitutional." 354 U.S. at 445.

If the injunction in *Near* was an unconstitutional prior restraint, it follows, *a fortiori*, that the much more ex-

tensive restraints authorized by the Indiana civil RICO Act are impermissible. Simply because two or more past publications have been found offensive, Indiana has empowered its courts to impose a total restraint upon a business' future speech activities and to dismantle that business totally, even though its principal activity was the dissemination of expression. Surely "this is of the essence of censorship." 283 U.S. at 713.

The Indiana Supreme Court concluded that these statutes escape First Amendment scrutiny because their purpose is "anti-racketeering" and thus content-neutral. However, *Near* rejected precisely this argument when it stated that "[c]haracterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." *Id.* at 720.

Moreover, both the pre-trial restraints that have already been imposed in this case, as well as the post-trial restraints approved by the Indiana Supreme Court, are far more onerous and restrictive of expression than even the broad restraint invalidated in *Near*. The injunction in *Near* authorized neither the seizure and forfeiture of the newspaper's assets nor the revocation of its license to do business. The *Near* injunction did not order the dissolution of the business, nor did it authorize the padlocking of the business premises where the offending speech had been generated. Rather, the *Near* injunction used civil processes to bar future expression generally. While the Indiana statute entails the same essential prior restraint

element condemned in *Near*,[20] Indiana's civil RICO statute goes *far* beyond the particular restraint invoked in *Near*.

Finally, *Near* made clear that the number or frequency of prior speech violations is irrelevant to the immunity against future restraints:[21]

> "[I]t does not matter that the newspaper or periodical is found to be '*largely*' or '*chiefly*' devoted to the publication of such derilictions." (Emphasis added). 283 U.S. at 720.

In contrast, the Indiana RICO statute permits a vastly more intrusive prohibition on future presumptively-protected speech, based upon as few as two acts of distributing obscene materials.

This Court has repeatedly held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Heller v. New York, supra,* 413 U.S. 483, 491 (1973), quoting *New York Times Co. v. United States,* 403 U.S.

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20 A defendant convicted under Indiana's civil RICO statute for prior speech violations is enjoined "from engaging in the same type of endeavor as the enterprise in which he was engaged . . . ." IC § 34-4-30.5-2(2). The effect of such an injunction where the enterprise is engaged in speech activities is to prevent a defendant from *any* prospective speech, whether protected or not.

21 In addressing the right to engage in unprotected expression without prior restraint, this Court observed that one "does not lose his right by exercising it. If [the] right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition." 283 U.S. at 720. Indeed, as noted *supra*, there was a finding of fact that the enjoined business had "regularly and customarily" published scandalous and defamatory articles. *Id.* at 706.

713, 714 (1971), quoting *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963). *Accord: Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971); *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175, 181 (1968); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558-559 (1975); and *Vance v. Universal Amusement Co.,* 445 U.S. 308, 316, fn. 13 (1980). In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575, 583, fn. 6 (1983), this Court recently reaffirmed that prior restraints "strike to the core of the Framers' concerns" and accordingly compel a standard of scrutiny even higher than that applied to most regulations challenged as violative of the First Amendment.

Kingsley Books, Inc. v. Brown, supra, was one of the few cases in which this Court upheld any type of prior restraint upon allegedly obscene material. This Court sustained a New York statute which authorized an injunction, after an adversary hearing, prohibiting the sale or distribution of *specific publications* judicially determined to be obscene. In upholding the statute, the Court sharply distinguished the situation in *Near*:

> "Unlike *Near,* [the New York statute] is concerned solely with obscenity and . . . it studiously withholds restraint upon matters not already published and not yet found to be offensive." 354 U.S. at 445.

The contrast between the restraint in *Kingsley Books* and the case at bar could not be more dramatic. Based upon an adversary judicial determination of obscenity, the restraint in *Kingsley* was upheld because it was tailored to impact only on specific materials that had been pre-

viously adjudicated as unprotected expression. In the present case, if a court makes a determination that two or more prior obscenity violations were committed, it uses its pre-trial padlocking power and its post-trial forfeiture and other powers to bar the dissemination of *any* materials, whether obscene or protected. Unlike the restraint in *Kingsley*, the restraints in this case directly affect *protected* expression.

Subsequent to *Kingsley*, this Court decided numerous cases in which it condemned various state procedures for seizing or restricting alleged obscenity as impermissible prior restraints upon constitutionally-protected expression. In *Marcus v. Search Warrants*, 367 U.S. 717 (1961), this Court struck down a Missouri civil statutory procedure for seizure and destruction of obscene materials. Pursuant to the statute, police officers obtained, *ex parte*, a search warrant authorizing them to seize any and all obscene materials found at the defendant's premises. Pursuant to warrant, the officers seized approximately 11,000 copies of 280 publications. At trial, the court found a majority of the seized titles to be non-obscene, but ordered all copies of the obscene titles destroyed. This Court held that the statutory scheme lacked adequate procedural safeguards to guarantee the protection of non-obscene sexually-oriented materials and, for that reason, not only invalidated the seizure of the materials found to be constitutionally-protected, but also reversed the judgment forfeiting the materials actually found obscene.

The greatest significance of the *Marcus* decision, however, was that, in fashioning the rule that procedural safeguards are necessary to separate obscenity from protected speech, the Court: (1) implicitly concluded that the warrant procedure constituted a prior restraint (a conclusion later rendered explicit in this Court's summary of *Marcus* in *Heller v. New York*, 413 U.S. 483, at 491 (1973)); and (2) necessarily premised its opinion on the fundamental concept that *protected expression should not be removed from the public domain simply because, at the same premises, unprotected expression had also been sold or exhibited.* (Had this not been the Court's rationale, there would have been no need for the procedural safeguard of a prior adversary hearing to separate obscenity from protected expression.)

This underlying premise of *Marcus* was again applied in *Quantity of Copies of Books v. State of Kansas*, 378 U.S. 205 (1964), to invalidate a Kansas civil statutory procedure for seizure and forfeiture of obscene materials. Pursuant to that statute, police officers had presented seven books to a magistrate, who examined the materials *ex parte* and issued a search warrant directing seizure of all copies of the seven books as well as any other books of a similar type by the same publisher. Pursuant to the warrant, the officers seized 1,715 copies of 31 different titles and, after an adversary hearing was held in which all the seized items were found obscene, a judgment was entered for their forfeiture. This Court concluded that the Kansas procedures lacked adequate procedural safeguards to separate obscenity from constitutionally-protected expression, and as a result the Court reversed the judgment of forfeiture, finding the proceeding void *ab initio*, regardless of whether the materials were obscene.

As in *Marcus*, the crucial unstated premises of the opinion in *Quantity of Books* were: (1) the warrant pro-

cedure constituted a prior restraint,[22] and (2) proven violations, and even numerous proven violations, of a state's obscenity laws cannot justify the removal from circulation of *any* materials which might be constitutionally protected.

Not only were *Marcus* and *Quantity of Books* decided based upon a premise fully determinative of the present case; the prior restraints involved in those cases were far less severe than those imposed here. In *Marcus*, only the items actually believed to be obscene were seized, and the store was not padlocked. In the present case *all* items were seized, and the stores themselves padlocked, simply because a tiny fraction were alleged to have been obscene.

In *Quantity of Books*, all copies of 31 different titles were seized even though only seven titles had previously been evaluated by the judge. Accordingly, a vast quantity of presumptively-protected books was seized simply because *other* books were believed to be obscene. Thus, the rationale for seizure in *Quantity of Books* is very analogous to the rationale for seizure under the Indiana statute. However, the *restraint* imposed in *Quantity of Books* was not nearly as great as the devastating sanctions of padlocking and forfeiture authorized here.

In *Heller v. New York*, 413 U.S. 483, 491 (1973), and again in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 327-328 (1979), this Court reiterated that the principles of *Marcus* and *Quantity of Books* remain good law: any large-scale removal of speech materials based on an allegation

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22 Again, see this Court's characterization of the holding in *Quantity of Books* rendered in *Heller v. New York, supra*, 413 U.S. at 491.

that they are obscene requires a prior adversary hearing. *Heller's* reaffirmation of these cases was unquestionably based on this Court's concern that alleged obscenity violations not cause the public to be deprived of access to other presumptively protected materials. Indeed, so concerned was this Court in *Heller* about the premature suppression of presumptively protected materials alleged to be obscene that theater owners were held to be entitled to make and exhibit a copy of any seized film pending trial.

In *Roaden v. Kentucky, supra*, 413 U.S. 496 (1973), and in *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968), this Court expressly held that the seizure of one or more motion picture films from a theater by an officer based upon his personal determination of obscenity is a form of constitutionally impermissible prior restraint. 413 U.S. at 504. Obviously the pre-trial seizures actually implemented in the present case, as well as the post-trial forfeitures authorized by statute, constitute prior restraints *far* more severe than the seizure of one or even a few films as condemned in *Roaden* and *Lee Art, supra*.

In *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), this Court struck down a Texas nuisance injunction statute which authorized a court to issue a preliminary injunction of indefinite duration against the exhibition of any named or unnamed obscene films on a showing that the enjoined party had, in the past, exhibited any obscene films. The statute had also authorized a one-year padlocking of any location where one or more obscene items had been sold or exhibitd.

All 14 judges of the Fifth Circuit sitting *en banc* unanimously agreed that the portion of the statute author-

izing a one-year padlocking of the location would be an unconstitutional prior restraint on the businesses' ability to disseminate constitutionally-protected expression. 587 F.2d at 165-166. (However, that Court then gave the statute what it conceded was a "strained" saving construction so that the one-year closure provision would be "inapplicable" to obscenity. *Id.* at 166.) A majority of that court additionally concluded that the injunctive order against exhibition of any future unnamed obscene materials would also be an impermissible prior restraint.

The only issue before this Court in *Vance* was the constitutionality of the injunction against the future dissemination of both named and unnamed obscene materials, because Texas did not appeal the Fifth Circuit's 14-0 ruling striking the padlocking provision. This Court found the preliminary injunction against specific named films to be unconstitutional because non-obscenity would not be a defense to contempt charges.[23] As to the injunction against future unnamed obscene materials, this Court found that the statutory scheme was procedurally deficient in any event because it authorized prior restraints (preliminary injunctions) of indefinite duration. 445 U.S. at 316-317.

This Court's opinion in *Vance* is highly relevant to the present decision. First, *Vance* concluded that an injunction against unnamed obscene films is in fact a "prior restraint . . . more onerous than is permissible under *Freedman v. Maryland*[, 380 U.S. 51 (1965)] and *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975)."

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23 See 445 U.S. at 316 and see also fn. 4, *id.*, at 312.

445 U.S. at 317. Surely the restraints imposed in the present case are *far* more onerous than the one held unconstitutional in *Vance*.

Second, *Freedman's* underlying rationale, necessary to the decision in *Vance*, is that the state should not interfere with constitutionally-protected expression in its efforts to eliminate the obscene. The various procedural safeguards required by *Freedman, Vance, Marcus* and a long line of this Court's cases were created to keep non-obscene expression out of the state's anti-obscenity net. If Indiana may completely shut down a bookstore (or indeed an entire chain of bookstores) simply because it has found two or more items—later determined to be obscene—at one store, then it will have succeeded, in one swift stroke, in gutting the protections for non-obscene speech this Court has so painstakingly developed through many decades of its decisions.[24]

In *Arcara v. Cloud Books, Inc., supra,* — U.S. —, 106 S.Ct. 3172 (1986), a narrow majority of this Court recently held that an adult bookstore could be shut down by the state in order to prevent the recurrence of unlawful conduct not involving speech. However, the Court's opinion reaffirmed that First Amendment scrutiny would apply

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24 *See, e.g., Marcus v. Search Warrant,* 367 U.S. 717 (1961); *Quantity of Copies of Books v. Kansas,* 378 U.S. 205 (1964); *Freedman v. Maryland,* 380 U.S. 51 (1965); *Tietel Film Corp. v. Cusack,* 390 U.S. 139 (1968); *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968); *Blount v. Rizzi,* 400 U.S. 410 (1971); *United States v. Thirty-Seven Photographs,* 402 U.S. 363 (1971); *Heller v. New York,* 413 U.S. 483 (1973); *Roaden v. Kentucky,* 413 U.S. 496 (1973); *Southeastern Promotions Ltd. v. Conrad,* 420 U.S. 546 (1975); and *Brockett v. Spokane Arcades, Inc.,* (Brockett I), 454 U.S. 1022 (1981).

"where it was conduct with a significant expressive element that drew the legal remedy in the first place. . . ." 106 S.Ct. at 3177. Moreover, the concurring opinion of Justices O'Connor and Stevens indicated that a majority of this Court would find First Amendment scrutiny applicable where, as here, a closure order was based on prior obscenity violations:

> "If, however, a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Id.* at —, 106 S.Ct. at 3178.

Since the present case, unlike *Arcara*, involves a severe restraint premised solely on the sale of allegedly obscene materials, the Indiana Supreme Court erred in failing to analyze it under the strict First Amendment standard of review applicable to prior restraints.

The Indiana Supreme Court's conclusion is also inconsistent with that reached by the overwhelming majority of state appellate courts and lower federal courts which have considered the very closely analogous question of the constitutionality of laws which permit the license revocation or padlocking of a business where prior obscenity offenses have occurred.[25]

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[25] The following cases have found nuisance laws unconstitutional which provide for the padlocking of businesses where obscenity offenses have occurred in the past: *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 164-166 (5th Cir. en banc

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1978) [as to this particular point, all 14 judges of the en banc court were in agreement], *aff'd.* on other grounds, 445 U.S. 308 (1980); *Pollitt v. Connick*, 596 F.Supp. 261, 269-272 (E.D.La. 1984); *General Corp. v. Sweeton*, 320 So.2d 668 (Ala. 1975), cert. den. 425 U.S. 904 (1976); *People ex rel. Busch v. Projection Room Theater*, 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600 (1976) *cert. den.* 429 U.S. 922 (1976); *Mitchem v. State ex rel. Schaub*, 250 So.2d 883 (Fla.1971); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *People v. Sequoia Books*, 518 N.E.2d 775 (Ill.App. 1988); *State ex rel. Blee v. Mohney Enterprises*, 289 N.E.2d 519 (Ind.App. 1973); *Kansas v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976); *Giarrusso v. D'Iberville Gallery*, 295 So.2d 891 (La.App. 1974); *Gulf States Theaters of Louisiana v. Richardson*, 287 So.2d 480 (La. 1974); *Parish of Jefferson v. Bayou Landing Ltd., Inc.*, 350 So.2d 158 (La.1977), *overruling* La.App., 341 So.2d 23; *Society to Oppose Pornography, Inc. v. Thevis*, 255 So.2d 876 (La.App. 1972); *City of Minot v. Central Ave. News, Inc.*, 308 N.W.2d 851 (N.D. 1981); *State ex rel. Field v. Hess*, 540 P.2d 1165 (Okla. 1975); *Commonwealth ex rel. Davis v. Van Emberg*, 347 A.2d 712 (Penn. 1975); and *New Rivieria Arts Theatre v. Davis*, 219 Tenn. 652, 412 S.W.2d 890 (1967). *See also J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 494-495 (9th Cir. 1984), *rev'd. on other grounds sub nom. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Nihiser v. Sendak*, 405 F.Supp. 482, 491-492 (N.D.Ind. 1974), *vacated and remanded on other grounds*, 423 U.S. 976 (1975), *order re-entered* August 16, 1976 (unpub.), *aff'd.* 431 U.S. 961 (1977); *Huffman v. Pursue, Ltd*, 420 U.S. 592, 612, n. 23 (1975); *cf. Speight v. Slaton*, 415 U.S. 333 (1974); *State ex rel. Ewing v. "Without a Stitch"*, 307 N.E.2d 911 (Ohio 1974).

The following cases have held unconstitutional laws which allow a permit to be either revoked or denied upon a prior obscenity violation: *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986); *Entertainment Concepts Inc. III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980); *Genusa v. City of Peoria*, 475 F.Supp. 1199, 1207-09 (C.D.Ill. 1979), *aff'd.* 619 F.2d 1203, 1217-1220 (7th Cir. 1980); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Bayside Enterprises, Inc. v. Carson*, 470 F.Supp. 1140 (M.D.Fla. 1979); *San Juan Liquors v. Consol. City of Jacksonville*, 480 F.Supp. 151 (M.D.Fla. 1979); *Yuclan Enterprises Inc. v. Arre*, 488 F.Supp. 820 (D.Hawaii 1980); *Avon 42nd Street Corp. v. Myerson*, 352 F.Supp. 994 (S.D.N.Y. 1972); *Natco Theatres Inc. v. Ratner*, 463 F.Supp. 1124 (S.D.N.Y. 1979); *Oregon Bookmark Corp v. Schrunk*, 321

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The common thread of all these cases is their conclusion that the First Amendment doctrine of prior restraints prohibits the government from restraining future expression on the basis of prior speech violations. All of these decisions explicitly or implicitly reject the notion that padlocking or license revocation is simply a subsequent punishment and thereby need not be subjected to First Amendment scrutiny as a prior restraint.

Perhaps one of the clearest ways to illustrate the pernicious evil of this statute is to observe that if the state can make obscenity a predicate RICO offense, there is no constitutional obstacle to making libel or false advertising predicate RICO offenses as well. As a result, under the state's theory of constitutional law, there would be no impediment to padlocking and forfeiting the New York Times Company, the Washington Post or the National Broadcasting Co. simply because the state proved that two libels or deceptive ads were published.

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F.Supp. 639 (D.Oregon 1970); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (D.Utah 1980); *Perrine v. Municipal Court*, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. den. 404 U.S. 1038 (1972); *Kuhns v. Santa Cruz Co. Bd. of Sup'rs.*, 128 Cal.App3d 369, 374-375, 181 Cal.Rptr. 1, 3-4 (1982); *City of Delevan v. Thomas*, 31 Ill.App.3d 630, 334 N.E.2d 190 (1975); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370 (Minn. 1975); *Hamar Theatres Inc. v. City of Newark*, 150 N.J.Super. 14, 374 A.2d 502 (1977); *People v. J.W. Productions*, 413 N.Y.S.2d 552 (N.Y.C.Cr.Ct. 1979); *City of Seattle v. Bittner*, 81 Wash.2d 747, 505 P.2d 126 (1973); *see also Intern. Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832-833 (5th Cir. 1979); *Fernandes v. Limmer*, 663 F.2d 619, 629-630, 632 (5th Cir. 1981); *cf. Chulchian v. City of Indianapolis*, 477 F.Supp. 128, 131-132 (S.D.Ind. 1979), *aff'd.*, 633 F.2d 27, 30 (7th Cir. 1980); *Marks v. City of Newport, Ky.*, 344 F.Supp. 675 (E.D.Ky. 1972).

Similarly, under the existing statute, if a nationwide bookstore chain such as Waldenbooks or B. Dalton's had sold two or more copies of a single issue of *Penthouse Magazine* which subsequently was found obscene, the entire inventories and assets of Waldenbooks or B. Dalton's could be forfeited to the state and every store in that "enterprise" could be padlocked, thereby prohibiting them from even selling the Bible. Obviously, the theory upon which the state is proceeding herein is inconsistent with basic First Amendment protections.

C. The Indiana Statutory Scheme Must Also Fall When Analyzed As An Overly Broad Law Which Restricts Substantial Amounts Of Constitutionally-Protected Expression.

Indiana's civil RICO statute must also fall as legislation which broadly stifles protected expression even though arguably aimed at legitimate state goals.

In *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964), this Court definitively ruled that the punishment for unlawful association and expression could not include an undue restriction on the prospective exercise of fundamental constitutional rights. In that case, the state of Alabama obtained an injunction against the N.A.A.C.P. to prevent it from conducting any business in the state of Alabama. The state sought the injunction in part because the N.A.A.C.P. was carrying on "its activities in Alabama without complying with state laws requiring foreign corporations to register . . . ." 377 U.S. at 303. Although the injunction was upheld by the Alabama Supreme Court, this Court held that "past failure to register could not constitutionally be made the basis for *permanently* preventing the Association from registering and thereby denying its mem-

bers the right to associate in Alabama." 377 U.S. at 306, fn. 12 (emphasis in original).

In response to the state's additional argument that the N.A.A.C.P. violated Alabama law by organizing consumer boycotts, this Court then held that even assuming the underlying state laws were valid proscriptions of the organization's conduct, the sanctions imposed for their violation were nonetheless unconstitutional:

> "This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. '* * * [T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' Cantwell v. Connecticut, 310 U.S. 296, 304. '* * * [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' Shelton v. Tucker, 364 U.S. 479, 488 (footnote omitted)." (Citation omitted) *N.A.A.C.P. v. Alabama, supra*, 377 U.S. at 307-308.[26]

Applying the foregoing mode of analysis, it is quite clear that the inclusion of obscenity as a predicate RICO offense subjects those whose only offense is two obscenity violations to the most repressive prospective restraints on expression imaginable. The state can not only seize and

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[26] To the same effect, see the numerous cases cited in support of this proposition at 377 U.S. at 308, and in *Aptheker v. Secretary of State*, 378 U.S. 500, 507-508 (1964). *Cf. New York v. Ferber*, 458 U.S. 747, 773 (1982) ["the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial."]

forfeit the entire inventory of every bookstore, newsstand, video-store, theater, motion picture studio or newspaper in a chain of such businesses, but can also: (1) seize all neutral instrumentalities necessary to engage in future presumptively protected expression (*e.g.*, motion picture projectors, printing presses, etc.); (2) padlock all such businesses; (3) revoke all applicable business licenses and corporate charters; and (4) enjoin all members of the "enterprise" from ever again engaging in the type of business which the enterprise operated. Moreover, as construed and applied by the respondent Indiana authorities, the statute authorizes the forfeiture of the real property of any landlord who rents his store or building to an "enterprise" which subsequently produces, distributes, sells, rents or exhibits two or more obscene items.[27] A more pervasive restraint on protected expression could hardly be imagined.

Where, as here, a statutory scheme imposes a substantial restriction on constitutionally-protected expression, a strict standard of scrutiny is required to determine whether the purposes underlying such a law could possibly necessitate so severe a restraint. *Schad v. Burough of Mount Ephraim*, 452 U.S. 61 (1981).

In *Schad*, this Court applied a strict standard of scrutiny in striking down a zoning ordinance that prohibited all live entertainment (*see* fn. 7, 452 U.S. at 68 and accompanying text), and concluded that "[t]he Borough has not established that its interests could not be met by

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[27] *See* Amicus Brief of Burke Mendenhall filed herein in support of Petition for Writ of Certiorari.

restrictions that are less intrusive on protected forms of expression." *Id.* at 74.

Similarly, Indiana cannot justify its inclusion of obscenity violations as conclusive evidence of racketeering activity, subjecting the violator to the panoply of repressive RICO sanctions. If punishment is the purpose of including obscenity as a RICO trigger, then the statute is broader than necessary because existing criminal obscenity statutes in Indiana were created precisely for the purpose of punishing such violations.

If the purpose is not punishment, but the dismantling of the business in order to prevent the possibility of any future violations, then such purpose not only constitutes the essence of prior restraint but is also clearly overbroad where, as here, the only predicate acts consist of allegedly illegal speech activities.[28] *See Arcara v. Cloud Books, Inc., supra,* 106 S.Ct. at 3178 (concurring opinion of Justices O'Connor and Stevens). As *Near v. Minnesota, supra,* clearly held, the intentional restriction of all future ex-

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[28] State and federal governments have limited discretion in establishing punishments for obscenity violations, as contrasted to other crimes. As stated in *Smith v. California, supra:*

> "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power." 361 U.S. at 155.

Smith recognized that "[t]he ordinance here in question, to be sure, only imposes criminal sanctions on a bookseller if in fact there is to be found in his shop an obscene book" (*id.* at 152), but went on to point out that the state has *no* "power to restrict the dissemination of books which are not obscene." (*Id.*) *See also Roth v. United States,* 354 U.S. 476, at 488 (1957) and *Miller v. California,* 413 U.S. 15, 23-24 (1973).

pression solely because of past unlawful expression "is of the essence of censorship." 283 U.S. at 713.

For all the foregoing reasons, both the pre-trial and post-trial sanctions of Indiana's civil RICO statute are facially unconstitutional as applied to those whose only predicate offenses are obscenity violations.

D. This Court Has Jurisdiction To Consider The Facial Validity Of Both The Pre-Trial And Post-Trial Sanctions Authorized By Indiana's Civil RICO Statute.

This Court has jurisdiction to review the facial validity of both the pre-trial and post-trial sanctions at issue in this case consistent with 28 U.S.C. § 1257's jurisdictional limitation that this Court only review "final" judgments from the state courts.

The Indiana Supreme Court's ruling has finally determined that the civil RICO Act's pre-trial restraints on First Amendment expression imposed in this case are constitutional and shall remain in effect pending trial. That determination is sufficiently final to invoke this Court's jurisdiction under 28 U.S.C. § 1257. *National Socialist Party of America v. Village of Skokie,* 432 U.S. 43 (1977); *M.I.C. Ltd. v. Bedford Township,* 463 U.S. 1341 (1983) (per Justice Brennan as Circuit Justice); *Cf. Renaissance Arcade and Bookstore v. County of Cook,* — U.S. —, 106 S.Ct. 9 (1985) (per Justice Stevens as Circuit Justice).

As the pre-trial sanctions included an order that petitioner's business be padlocked pending trial, the prior restraint issue is necessarily presented in petitioner's challenge to the pre-trial, as well as post-trial, sanctions.

The Indiana Supreme Court also finally determined that the post-trial sanctions under Indiana's civil RICO

statute are immune from First Amendment scrutiny where the only predicate offenses are obscenity violations. Indeed, by upholding the pre-trial seizures which are statutorily authorized only for the purpose of preserving assets for post-trial forfeiture, and by expressly concluding that the post-trial forfeiture remedy would not pose an unconstitutional prior restraint, the Indiana Supreme Court gave a concrete, non-speculative interpretation of the permissible scope of the statute's post-trial forfeiture remedies. This Court's prior decisions establish beyond doubt that such a determination is of sufficient finality to invoke this Court's jurisdiction.

Where, as here, a federal issue has been finally decided by the highest state court and further trial proceedings are pending in which the party seeking review might prevail on non-federal grounds, thereby precluding review of the federal issue by this Court, this Court has deemed such rulings to be "final," particularly where, as here, "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-483 (1975).[29] *Accord Hudson Distributors v. Eli Lilly*, 337 U.S. 386 (1964) [finding finality under these circumstances where federal policy recognized preemptive effect of federal antitrust laws over parallel state regulations], and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247, fn. 6 (1974) [finding finality under these circumstances where federal policy is to vindicate First Amendment rights].

This Court's rationale for finding jurisdiction in *Miami Herald, supra,* is particularly pertinent here:

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[29] A thorough summary of these types of "finality" cases is presented in *Cox*, 420 U.S. at 482-485.

> "Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [the statute] could only further harm the operation of a free press. Mills v. Alabama, 384 U.S. 214, 221-222 (1966) (Douglas, J., concurring)." 418 U.S. at 247, fn. 6.

In the present case, it would be equally intolerable to leave unanswered the question whether the forfeiture and license revocation remedies of a civil RICO statute can be applied to those whose only offense involves speech-related conduct. As discussed further below, the chilling effect which such an unsettled status would create would have an intolerable impact on federal constitutional rights throughout both Indiana and the nation.

It is also relevant that Chief Justice Burger's majority opinion in *Miami Herald* cited with approval the concurring opinion of Justice Douglas in *Mills v. Alabama*, 384 U.S. 214, 221-222 (1966), which pointed out that "even had appellant been unwilling to concede that he has no defense—apart from the constitutional question—to the charges against him, we would [nonetheless] be warranted in reviewing this case" on grounds that "where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution." *Id.*

Accordingly, this Court has jurisdiction to review the constitutionality of the civil RICO statutory scheme in its entirety, and, petitioner respectfully submits, should do so.

II

EVEN IN THEIR OPERATION UPON MATERIALS ACTUALLY ALLEGED TO BE OBSCENE, THE PROCEDURES AUTHORIZED BY THE INDIANA RICO STATUTE VIOLATE VIRTUALLY EVERY PROCEDURAL SAFEGUARD REQUIRED BY THE FIRST AMENDMENT.

The constitutional invalidity of this statutory scheme is further underscored by the fact that it is completely devoid of the procedural safeguards required under the First Amendment in any proceeding to sanction unprotected speech. Even as applied to materials actually alleged and shown to be obscene, the civil RICO Act authorizes proceedings which are void *ab initio* because they violate virtually every procedural rule this Court has deemed essential to ensure "the necessary sensitivity to freedom of expression." *Freedman v. Maryland,* 380 U.S. 51, 58 (1965).

As this Court emphasized in *Speiser v. Randall,* 357 U.S. 513, 525 (1958), "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finally drawn . . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools." Accordingly, the Court later stressed, "a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for protected speech." *Marcus v. Search Warrants,* 367 U.S. 717, 731 (1961). Obviously, the procedures authorized by the Indiana civil RICO statute as applied to obscenity entail disastrous consequences for protected speech.

First, the statute on its face and as applied in this case authorizes the pre-trial seizure of the entire communicative "enterprise" pursuant to an *ex parte* hearing without notice to the defendants. Even if the entire contents of the bookstore were alleged to be obscene (as of course they are not here), this Court has unequivocally held that an adversary hearing must be afforded prior to any such mass seizure of allegedly unprotected materials. In *Marcus v. Search Warrants, supra,* and *Quantity of Copies of Books v. Kansas,* 378 U.S. 205 (1964), as detailed above, this Court held void *ab initio* proceedings which involved the mass seizure of communicative materials in the absence of a prior adversary hearing "designed to focus searchingly upon the question of obscenity." *Marcus, supra,* 367 U.S. at 732.

If an *ex parte* injunction, which "represents the most devastating of restraints on constitutionally protected activities" *(Walker v. City of Birmingham,* 388 U.S. 307, 346 (1967)), cannot be imposed even upon allegedly obscene materials, *a fortiori* it cannot be imposed upon presumptively protected expression as to which the statute renders any allegation of obscenity irrelevant. Any such seizure upon allegations that *other* material is unprotected constitutes a blatant and impermissible prior restraint.

As vividly highlighted by the facts of this case, these pre-trial seizure and padlocking measures authorized by the RICO statute also create a restraint of indefinite duration of the sort this Court condemned in *Freedman v. Maryland,* 380 U.S. 51 (1965), and more recently in *Vance v. Universal Amusement Co., Inc.,* 445 U.S. 308 (1980). In *Freedman,* one of the basic First Amendment procedural requirements this Court deemed necessary even for the

restraint of *allegedly obscene* materials was a final adjudication within "the shortest fixed period compatible with sound judicial resolution." 380 U.S. at 59. In *Vance*, this Court struck down a statute authorizing interim injunctions of indefinite duration against named or unnamed obscene films, upon a preliminary finding of one or more obscene exhibitions in the past.[30]

The Indiana statute clearly transgresses this First Amendment procedural mandate, entailing no requirement of a final judicial determination within any specified period. The Indiana Supreme Court held only that trial was required within a "reasonable" time, hardly an adequate guarantee even for allegedly unprotected speech.

Similarly, the Indiana RICO scheme fails to afford prompt or immediate *appellate* review of interim or final restraints upon expression, as required in *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 1977). The gravity of this procedural failing is dramatized by the facts of this case, in which petitioner filed an application for a stay in the state Court of Appeals within days of the trial court's denial of its motion to vacate the *ex parte* seizure order. Despite continuous efforts to obtain prompt appellate review, the three Fort Wayne bookstores remained padlocked for more than a year before the Court of Appeals granted the stay.

The statutory scheme also violates First Amendment requirements in establishing and apportioning the burden

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30 *See also United States v. Thirty-Seven Photographs*, 402 U.S. 363, 371-72 (1971), condemning "delays as long as 40 days and even six months between seizure of obscene goods and commencement of judicial proceedings," and requiring final adjudication within 60 days.

of proof. In *Speiser v. Randall, supra*, 357 U.S. 513 (1958), this Court held that the burden of proof and the burden of going forward are of critical importance where the issue is entitlement to constitutional protection under the First Amendment. (This general principle was subsequently applied specifically in *Freedman v. Maryland, supra*, in the context of administrative censorship schemes.) As construed by the Indiana Supreme Court, however, the burden of proof and the burden of going forward is put entirely upon the defendant where the State obtains an *ex parte* order of seizure and closure. "Generally, a defendant would initiate [a challenge to] such action by the filing of a motion to vacate the seizure order." (Cert. App. 19.) The Court went on to note that if the defendant did not file a motion to vacate, then the only other remedy would be at a subsequent trial on the merits.

Additionally, the *ex parte* seizure and closure order issues upon a mere probable cause showing, and the final forfeiture proceeding is conducted merely upon a civil preponderance standard of proof. However, this Court intimated in *California ex rel. Cooper v. Mitchell Bros.*, 54 U.S. 90 (1981), that because of the importance of First Amendment interests, at least a "clear and convincing" standard is required in cases of this nature.[31]

Procedurally, the Indiana statute even in its operation to suppress alleged obscenity perfectly illustrates the dangers of "a scheme of governmental censorship devoid

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31 The California courts applied this standard upon remand of the underlying civil action to enjoin the exhibition of allegedly obscene films, *People ex rel. Cooper v. Mitchell Brothers*, 128 Cal.App.3d 937, 180 Cal.Rptr. 728 (1982).

of the constitutionally required safeguards," *Bantam Books v. Sullivan*, 372 U.S. 58, 64 (1963). As the Indiana Court of Appeals characterized the statute:

> "Devoid of procedural strictures including the standard of proof of a criminal prosecution, these civil remedies . . . may indeed curb the availability of obscenity but [cut] a broad swath into the realm of protected expression as well." 479 N.E.2d at 592.

The Court of Appeals concluded, therefore,

> "that the seizure orders against these defendants and the statutes' application to obscenity generally must be characterized as both substantively and procedurally unconstitutional . . .: as prior restraints of protected speech, or as impermissible procedures for restraining speech which may or may not be protected." *Id.* at 598.[32]

Petitioner does not contend that a statutory scheme so fundamentally flawed under the First Amendment could be salvaged merely by proper adherence to constitutionally-required procedures. Rather, this recitation of procedural deficiencies is merely to underscore the complete inappropriateness of the RICO statute's remedies as a means of regulating obscenity, representing as they do the most "insensitive tools" yet devised for that purpose.

The Georgia Supreme Court in *Sanders v. State*, 231 Ga. 608, 613-614, 203 S.E.2d 153, 157 (1974), struck down a closely analogous obscenity nuisance statute which authorized the permanent closure of a bookstore for one prior obscenity violation, the broad sweep of such a rem-

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[32] See the Court of Appeals' entire discussion of the statute's procedural inadequacies at Cert. App. 58-70.

edy "thereby *precluding the application of . . . procedural safeguards* and creating an unconstitutional restraint" upon presumptively-protected communication. (Emphasis added.) Aptly summarizing the constitutional flaws at issue here, the Georgia Court concluded that an overbroad statute of this type:

> "creates a chilling effect upon the exercise of free expression. We cannot throw out the protected to rid ourselves of the unprotected as these laws would require . . . We must use the deft, the precise and the remedial incision of the surgeon rather than the bludgeoning blow of the butcher to cut away cancer-our obscenity. If we do not, the body politic will suffer too mortal a blow from our zeal to have a decent society free of obscene publications but otherwise full of poetry and prose."

III

AS APPLIED TO THE PREDICATE OFFENSE OF OBSCENITY, THE RICO STATUTE'S SEIZURE, FORFEITURE, AND OTHER CIVIL REMEDIES CREATE AN UNPRECEDENTED AND CONSTITUTIONALLY IMPERMISSIBLE CHILLING EFFECT UPON A VAST RANGE OF PROTECTED EXPRESSION.

The pernicious effects of this draconian statute extend far beyond its direct operation upon communicative businesses which may be targeted for seizure and forfeiture. The very existence of the civil RICO statute with its extraordinarily severe penalties creates a chilling effect which would suppress indirectly what cannot be directly censored: a vast array of constitutionally-protected, non-obscene expression. The threat of pre-trial seizure and post-trial forfeiture of entire bookstores, theaters, video stores, or even chains of related communicative businesses,

merely for twice having disseminated materials subsequently deemed unprotected, creates an unprecedented *in terrorem* effect which can only result in pervasive self-censorship of protected materials. From this perspective as well, the Indiana RICO statute facially violates the First Amendment requirement that any such regulation be "narrowly tailored" to avoid the suppression of protected along with unprotected speech.

This Court has continually recognized that because First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society," they "need breathing space to survive." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). The very "threat of sanctions may deter their exercise almost as potently as the actual application of sanctions," *id.*, creating "a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within [their] purview." *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940). *See also Hustler Magazine v. Falwell*, — U.S. —, 108 S.Ct. 876, 880 (1988).

Integral to this Court's holding in *Roth v. United States*, 354 U.S. 476 (1957), that obscenity could be regulated as unprotected speech, was the stipulation that such regulation must not infringe upon the untrammeled circulation of *protected* materials.

> "[S]ex and obscenity are not synonymous . . . . The portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." 354 U.S. at 487.

Because protected expression must not get caught up in the nets designed to snare obscenity, the power to regulate in this area must be strictly limited: "The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary." *Id.* at 488.

The Indiana civil RICO statute, if sustained, would rip that door from its hinges, by imposing an institutional death sentence upon any communicative business civilly adjudged to have twice disseminated obscene material. These dramatically enhanced penalties for obscenity offenses, combined with the inherent vagueness of the obscenity definition and the closely related problem of scienter, can only serve to create an unprecedented regime of self-censorship. By making the dissemination of *any* sexually-explicit materials an ultrahazardous endeavor, these RICO statutes by their operation and by intent cast a chilling pall guaranteed to compel First Amendment businesses to "steer far wider of the unlawful zone," a result this Court long ago condemned in *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

Although this Court has struggled mightily to formulate an adequate definition of obscenity, the vagueness problem inherent in any such attempt persists. Whether or not one concludes that the vagueness of the *Miller* definition reaches a constitutionally intolerable level, the fact remains that the defendant charged with an obscenity offense almost never has advance knowledge that the material is obscene and therefore illegal. Unlike defendants

who have committed any of the other predicate RICO offenses, *e.g.* murder, robbery, or drug-trafficking, defendants alleged to have disseminated obscene materials may have done so fully and reasonably believing in the legality of their conduct.

Clearly, it is difficult if not impossible to predict what materials will be targeted for obscenity prosecution and subsequently adjudged to be obscene. Literary classics and major motion pictures have been subjected to obscenity prosecution; "Carnal Knowledge" was deemed obscene at trial by the Georgia Supreme Court until this Court reversed in *Jenkins v. Georgia*, 418 U.S. 153 (1974). Issues of *Penthouse*, available at most newsstands and convenience stores, have been declared obscene, *see Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (1980), and similar household-name magazines such as *Playboy* are frequently threatened with obscenity prosecution. *See, e.g., Council for Periodical Distributors Ass'n v. Evans*, 642 F.Supp. 552 (M.D.Ala. 1986). *Compare State v. Walden Book Co.*, 386 So.2d 342 (La. 1980), finding *Penthouse* to be constitutionally protected.

Even in formulating the current obscenity standard in *Miller v. California*, 413 U.S. 15, 23 (1973), this Court recognized that the regulation of obscenity "is an area in which there are few eternal verities." Nevertheless, the *Miller* majority sought to eliminate the problem of "fair notice" by reducing to a tolerable level the inherent subjectivity in the identification of obscenity. The Court formulated what it considered to be a "bright line" distinction between protected and unprotected erotic expression: "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of ob-

scene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct." 413 U.S. at 27. In the intervening 15 years, changing social conditions and technology have greatly eroded any "fair notice" of illegality provided by anti-obscenity statutes, particularly as mass popular viewing of X-rated videotapes has made "community standards" a more elusive concept than ever. With the advent of the "video revolution," X-rated videotapes of the type formely regarded as "hardcore" have become standard viewing fare in American homes. Rentals of such videotapes, estimated to exceed 100 million units in 1986, are predicted to continue to increase dramatically.[33] Most recently, *Newsweek* (February 1, 1988 at p. 44) reports the estimate that "more than 20 million Americans now watch at least one blue video each week."

Community standards, which have always been subject to criticism as "vague and unascertainable," such that the question of obscenity "is determined primarily by individual jurors' subjective reactions to the materials . . . rather than by the predictable application of rules of law," *Smith v. United States*, 341 U.S. 281, 314-316 (1977) (Justice Stevens, dissenting) have become even less ascertainable as a result of these developments. The statistics regarding the popularity of adult, sexually-explicit films indicate a dramatic shift in community standards, toward widespread acceptance of graphic depictions of sexuality. The result has been the complete erosion of what the *Miller* Court believed at the time to be a "bright-line" standard—a category of "hardcore" materials which producers and

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[33] See Petition for Writ of Certiorari, pp. 24-27.

distributors were given "fair notice" to eschew, but many of which now represent protected expression.[34]

Given this situation in which the *Miller* guidelines have become increasingly amorphous, obscenity statutes not only fail to give "fair notice" to communicative businesses, they equally fail "'to establish minimal guidelines to govern law enforcement,'" another variety of vagueness this Court recently condemned in *Kolender v. Lawson,* 461 U.S. 352, 358 (1983), quoting *Smith v. Goguen,* 415 U.S. 566, 574 (1974). As a result, obscenity statutes have increasingly come to "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" 461 U.S. at 358, quoting 415 U.S. at 575. Their enforcement has become, predictably, ever more "arbitrary and erratic." *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 88 (1973) (Brennan, dissenting).

Just as vagueness continues to present constitutional difficulties in the regulation of obscenity, the closely-re-

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[34] These changes in community standards have only exacerbated the vagueness problems noted by Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 84 (1973):

> "Any effort to draw a constitutionally acceptable boundary . . . must resort to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncracies of the person defining them. Although we have assumed that obscenity does exist . . . , we are manifestly unable to describe it in advance, except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech."

As Justice Scalia, concurring in *Pope v. Illinois,* — U.S. —, 107 S.Ct. 1918, 1923 (1987), has similarly observed, "it is quite impossible to come to an objective assessment of (at least) literary or artistic value."

lated issue of scienter also factors into the calculus of chilling effect. As this Court noted in *Mishkin v. New York,* 383 U.S. 502, 511 (1966), "the Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." Subsequently, the element of scienter constitutionally required for conviction of obscenity offenses has been defined as "knowledge of the contents[,] character and nature of the materials." *Hamling v. United States,* 418 U.S. 87, 123 (1974). This scienter requirement has been reduced to the vanishing point in practical application, however: *see Sherwin v. United States,* 572 F.2d 196, *cert. denied* 437 U.S. 909 (1978), (conviction of obscenity on mere knowledge of material's "sexual orientation"); *Sewell v. Georgia,* 238 Ga. 495, 233 S.E.2d 187, appeal dismissed, 435 U.S. 982 (1978) ("constructive knowledge" of material's contents sufficient scienter for obscenity conviction). Particularly in the case of the general distributor who desires to market a wide range of materials including the extraordinarily popular X-rated videos, for example, this very low threshold of scienter only exacerbates the "inherent ambiguities" of the obscenity definition and increases the peril of anyone disseminating erotic materials. Unable to make a safe judgment that much popular erotic material would be immune from prosecution, the distributor or video store operator has little choice but to engage in self-censorship of precisely the sort this Court wisely sought to preclude in *Smith v. California,* 361 U.S. 147 (1959).

Even assuming these vagueness and scienter problems do not create an unconstitutional chilling effect in the con-

text of garden-variety obscenity prosecutions, the additional factor of limitless confiscatory penalties in the form of civil RICO liability certainly exceeds First Amendment limitations in its deterrence of protected erotic expression. The specter of RICO prosecution solely for two obscenity violations[35] creates an informal regime of self-censorship at least as suppressive as that imposed by the strict-liability ordinance declared unconstitutional for that reason in *Smith*.

Faced with the drastic seizure, forfeiture and other RICO sanctions, failure to discern accurately the "dim and uncertain line" separating protected expression from obscenity is fraught with the extreme peril of forfeiting the entire communicative business to the state. Inevitably, many book-sellers, theater and video store operators will decide to exclude from their wares any and all sexually-oriented materials, the protected along with the unprotected, for fear of erring in the extremely difficult judgment as to whether any given item might now or at some later time be prosecuted as obscene.

Following its decision in *Roth* that obscenity could be criminalized as unprotected speech, this Court in *Smith v. California, supra,* was immediately confronted with an ordinance imposing strict liability upon a bookseller for possession of obscene material. The Court concluded this type of regulation would "work a substantial restriction

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[35] Under the Indiana RICO statute, predicate obscenity offenses include even display or dissemination of non-obscene "harmful matter" to minors, or display for sale of such material within 500 feet of a church or school, pursuant to I.C. § 35-49-3-3.

on the freedom of speech and of the press" by its chilling effect, 361 U.S. at 150, emphasizing that "our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene." *Id.* at 152. Noting the stricter standards applicable to regulation "having a potentially inhibiting effect on speech," the court articulated the essential problem of such chilling legislation: if speakers are required to act at their peril, "the free dissemination of ideas may be the loser." *Id.* at 151. A law like that in *Smith* is objectionable because it

> "tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge . . ., he will tend to restrict the books he sells to those he has inspected, and thus the State will have imposed a restriction upon . . . constitutionally protected as well as obscene literature. . . . The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to [materials] the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Id.* at 153-154.

Likewise the Indiana RICO statute, authorizing the ultimate remedy of forfeiture merely for two sales or exhibitions of unprotected materials, makes First Amendment businesses "the strictest censors of their merchandise," and "has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution." *Id.* at 152, 155.

Knowledge of materials' obscenity is not legally required and is rarely possible under current standards; the penalty imposed for a wrong guess upon that score thus becomes crucial in assessing a law's chilling effect. Building upon the Court's concern in *Smith* to avoid self-censorship, this Court in *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), held that the "malice" standard for libel actions by public figures was essential so that debate on public issues could remain "uninhibited, robust, and wide-open." 376 U.S. at 270. In *New York Times*, the Court addressed the scienter component of the equation so as to lessen the chill created by the intimidating threat of large libel judgments. "A rule compelling the critic of official conduct to guarantee the truth of all . . . factual assertions . . . on pain of libel judgments virtually unlimited in amount" creates an intolerable degree of self-censorship, *id.* at 279; so too does a rule compelling booksellers and others to guarantee the non-obscenity of all their wares, on pain of limitless RICO forfeiture judgments. The resulting "pall of fear and timidity . . . is an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278.

The facts of this case, and the equally egregious outcome of the first federal RICO/obscenity prosecution in *United States v. Pryba*, demonstrate that the *in terrorem* effect of this and other RICO statutes predicated upon obscenity is no idle, hypothetical threat to the exercise of First Amendment rights and the circulation of protected mtaerials. In *Pryba*, 674 F.Supp. 15044 (E.D.Va. 1981), the trial court upheld the constitutionality of the federal criminal RICO statute as applied to obscenity, concluding

as did the Indiana Supreme Court that the statute simply did not implicate the First Amendment at all, and that "whatever chilling effect [the RICO forfeiture provisions] may have is legitimate and intended." 674 F.Supp. at 1513. The ensuing forfeiture order,[36] like the forfeitures sought in this case, authorized the government to confiscate the entire assets of five communicative businesses, including "the assets of three shops where customers could rent a variety of videocassettes, everything from family fare like the film 'Star Wars' to sexually-explicit tapes," the *New York Times* reported.[37]

This current wave of RICO/obscenity prosecutions and civil forfeiture actions sends an unmistakable message to any bookstore, periodical, video store, or theater which would make so bold as to disseminate *any* materials dealing candidly with sexuality. Despite the enormous popularity of sexually-oriented films, and despite the fact that a great deal of such entertainment is clearly non-obscene and protected by the First Amendment, the obscenity application of RICO statutes represents highly politicized pressure aimed at curtailing all erotic expression, including

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36 The *Pryba* forfeiture order is reproduced as Appendix B to this Brief, App. 9-13.

37 As the *Times* further noted, "the Justice Department plans to seek a series of racketeering indictments this year designed to seize tens of millions of dollars from the distribution and sale of sexually-explicit material." "U.S. Planning Major Drive Against Big Pornographers," January 12, 1988.

protected materials.[38] The clear warning to all communicative businesses is to "steer far wider of the unlawful zone," by self-censoring any materials which could possibly trigger the confiscatory sanctions of the RICO Act.

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CONCLUSION

As applied to obscenity, Indiana's civil RICO statute is among the most severe threats to protected expression ever to come before this Court for review. Petitioner respectfully submits that this Court should strike the entire statute as facially unconstitutional in its application to obscenity and should reverse the judgment of the Indiana Supreme Court.

DATED: May 12, 1988

Respectfully submitted,

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[38] The *Pryba* court, as noted above, frankly recognized that the RICO forfeiture provisions are "intended" to have a chilling effect. 674 F.Supp. at 1513. Likewise the Meese Commission candidly acknowledged the unconstitutional purpose to effect a prior restraint underlying these statutes: "RICO provides an effective means to substantially eliminate obscenity businesses." Attorney General's Commission on Pornography, *Final Report* at p. 498 (July 1986).

APPENDIX A
INDIANA CIVIL AND CRIMINAL RICO STATUTES

CHAPTER 30.5
CIVIL REMEDIES FOR RACKETEERING ACTIVITY

34-4-30.5-1. *Definitions.*—As used in this chapter:

"Aggrieved person" means a person who has an interest in real property or in an enterprise that:

(1) Is the object of corrupt business influence (IC 35-45-6-2); or

(2) Has suffered damages or harm as a result of corrupt business influence (IC 35-45-6-2).

"Enterprise" means the same as the definition of that term found in IC 35-45-6-1. [IC 34-4-30.5-1, as added by Acts 1980, P.L. 199, § 1; P.L.308-1895, § 1.]

34-4-30.5-2. *Action by prosecuting attorney to enjoin violation of IC* 35-45-6-2*—Orders.*—The prosecuting attorney in a county in which the violation occurs, may bring an action to enjoin a violation of IC 35-45-6-2. An action under this section may be brought in any circuit or superior court in a county in which the violation occurs. If the court finds by a preponderance of the evidence that a violation of IC 35-45-6-2 has occurred, it may:

(1) Order a defendant to divest himself of any interest in any enterprise or real property;

(2) Impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) Order the dissolution or reorganization of any enterprise;

(4) Order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(5) Order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) Make any other order or judgment that the court considers appropriate.

In any order or judgment made by the court under this section, the judge shall make due provision for the rights of innocent persons. [IC 34-4-30.5-2, as added by Acts 1980, P.L. 199, § 1.]

34-4-30.5-3. *Action by prosecuting attorney for forfeiture of property—Orders.*—(a) The prosecuting attorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in

the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred. [IC 34-4-30.5-3, as added by Acts 1980, P.L. 199, § 1.]

34-4-30.5-4. *Seizure of property by law enforcement officer—Seizure without court order—Disposition pending forfeiture and final disposition—Return to owner.*—(a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. Seizure may be made without court order only if:

(1) The seizure is incident to a lawful arrest or search, or to an inspection under an administrative inspection warrant; or

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter.

(b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:

(1) Place the property under seal;

(2) Remove the property to a place designated by the court; or

(3) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(c) Property seized under subsection (a) is not subject to [replevin], but is considered to be in the custody of the law enforcement officer making the seizure, subject only to order of the court. However, if a seizure of property is made in accordance with subsection (a), the prosecuting attorney shall promptly bring an action for forfeiture under section 3 [34-4-30.5-3] of this chapter. If an action is not filed within one hundred eighty [180] days after the date of the seizure, the law enforcement agency whose officer made the seizure shall return the property to its owner. [IC 34-4-30.5-4, as added by Acts 1980, P.L. 199, § 1.]

34-4-30.5-5. *Actions by aggrieved person.*—(a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable damage to the aggrieved person is not required. The court may order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

(b) An aggrieved person may bring an action against a person who has violated IC 35-45-6-2 in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located, for damages suffered as a result of corrupt business influence. Upon a showing by a preponderance of the evidence that the aggrieved person has been damaged by corrupt business influence, the court shall order the person causing the damage through a violation of IC 35-45-6-2 to pay to the aggrieved person:

(1) An amount equal to three (3) times his actual damages;

(2) The costs of the action;

(3) A reasonable attorney's fee; and

(4) Any punitive damages awarded by the court and allowable under law.

(c) The defendant and the aggrieved person are entitled to a trial by jury in an action brought under this section.

(d) An aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state has in the same property or proceeds.

(e) If the state is an aggrieved person, the attorney general has concurrent jurisdiction with the prosecuting attorney to bring an action under this section. [IC 34-4-30.5-5, as added by Acts 1980, P.L. 199, § 1; P.L. 308-1985, § 2.]

34-4-30.5-6. *Collateral estoppel.*—In any action brought under this chapter, the principle of collateral estoppel operates to bar relitigation of the issues previously determined in a criminal proceeding under IC 35-45-6-2. [IC 34-4-30.5-6, as added by Acts 1980, P.L. 199, § 1.]

CHAPTER 6

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

(CRIMINAL RICO STATUTE)

35-45-6-1. *Definitions.*—As used in this chapter:

"Documentary material" means any document, drawing, photograph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) Sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) Union, association, or group, whether a legal entity or merely associated in fact.

"Pattern of racketeering activity" means engaging in at least two [2] incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five [5] years after a prior incident of racketeering activity.

"Racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation, of a provision of IC 23-2-1, or of a rule or order issued under IC 23-2-1; a violation of IC 35-47; a violation of IC 35-49-3; murder (IC 35-42-1-1); battery as a class C felony (IC 35-42-2-1); kidnapping (IC 35-42-3-2); child exploitation (IC 35-42-4-4); robbery (IC 35-42-5-1); arson (IC 35-43-1-1); burglary (IC 35-43-2-1); theft (IC 35-43-4-2); receiving stolen property (IC 35-43-4-2); forgery (IC 35-43-5-2); fraud (IC 35-43-5-4); bribery (IC 35-44-1-1); offical misconduct (IC 35-44-1-2); conflict of interest (IC 35-44-1-3); perjury (IC 35-44-2-1); tampering (IC 35-44-3-4); intimidation (IC 35-45-2-1); promoting prostitution (IC 35-45-4-4); promoting professional gambling (IC 35-45-5-4); dealing in cocaine or a narcotic drug (IC 35-48-4-1); dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2); dealing in a schedule IV controlled substance (IC 35-48-4-3); dealing in a schedule V controlled substance (IC 35-48-4-4); or dealing in marijuana, hash oil, or hashish (IC 35-48-4-10). [IC 35-45-6-1, as added by Acts 1980, P.L. 199, § 2; P.L.190-1984, § 1.]

35-45-6-2. *Corrupt business influence—Penalty.*—(a) A person:

(1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C felony. [IC 35-45-6-2, as added by Acts 1980, P.L. 199, § 2.]

APPENDIX B

ORDER OF FORFEITURE IN United States v. Pryba, E.D.Va. Crim. No. 87-00208-A ENTERED NOV. 18, 1987.

IN THE UNITED STATES DISTRICT COURT
FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	Criminal
v.	)	No. 87-00208-A
	)	
DENNIS E. PRYBA,	)	(Filed November
BARBARA A. PRYBA,	)	18, 1987)
JENNIFER C. WILLIAMS, and	)	
EDUCATIONAL BOOKS, INC.	)	

ORDER OF FORFEITURE

WHEREAS, in the Indictment, in the above-entitled case, plaintiff, the United States of America, sought the forfeiture of certain properties of defendants Dennis E. Pryba and Barbara A. Pryba (hereinafter referred to as the "defendants") pursuant to 18 U.S.C. § 1963;

AND WHEREAS, on November 10, 1987, a jury found the defendants guilty of 18 U.S.C. § 1962(a), (c) and (d);

AND WHEREAS, on November 18, 1987, the same jury found that the defendants have certain interests in properties listed below which afforded them a source of influence over the enterprise in violation of 18 U.S.C. § 1963(a).

NOW THEREFORE IT IS ORDERED that the following properties are forfeited to the United States of America:

1. A parcel of property commonly known as 8411 Old Marlboro Pike, Unit 15, Upper Marlboro, Maryland, part of the Penn Belt Industrial Condominium complex; purchased in the names of Dennis and Barbara Pryba on or about February 28, 1983 and recorded in the record office of Prince George's County, Maryland, in Deed Book 5652, Page 211.
2. All shares of stock of B & D Corporation.
3. All shares of stock of Educational Books.
4. All shares of stock of Marlboro News, Inc.
5. All shares of stock of Home Video Sales, Inc.
6. All shares of stock of Video Shop, Ltd.
7. All corporate assets of B & D Corporation, located at 8411 Old Marlboro Pike, Upper Marlboro, Maryland, including, but not limited to, inventory, United States Currency, bank accounts (including Citizens Bank & Trust account No. 037-0341 and National Bank of Maryland account No. 620-2435-8), machinery, equipment, coin boxes, furniture, fixtures, motor vehicles (including a 1981 Audi VIN No. WAUHC0438BN 03154), and all shares of stock in Educational Books, Inc., Marlboro News, Inc., and Home Video Sales.
8. All corporate assets of Educational Books, Inc., located at 9158 Richmond Highway, Ft. Belvoir, Virginia, including, but not limited to, inventory, United States Currency, bank accounts (including 1st American Bank of Virginia account No. 60055123), coin boxes, cash registers, movie machines, and fixtures.
9. All corporate assets of Marlboro News, Inc., located at 7609 Marlboro Pike, Forrestville, Maryland, and 7425 Annapolis Road, Hyattsville, Maryland, including but not limited to, inventory, United States Currency,

bank accounts (including Citizens Bank & Trust account no. 0397258 and Sovran Bank account No. 46-05290-3), furniture, fixtures, machinery, equipment, cash registers and projectors.

10. All corporate assets of Home Video Sales, Inc., located at 8411 Old Marlboro Pike, Upper Marlboro, Maryland, including, but not limited to, United States Currency, bank accounts (including 1st National Bank of Maryland account No. 6215279-8), video machines, copy machine, vehicles (including a 1982 BMW 3201 VIN No. WBAAG4303C8069688), and all shares of stock of Video Shop, Ltd.
11. All corporate assets of Video Shop, Ltd. which corporate address is 8411 Old Marlboro Pike, Upper Marlboro, Maryland, (d/b/a Video Rental Centers at the below-listed locations: including, but not limited to, video tape cassettes, United States Currency, bank accounts (including Maryland National Bank account No. 512012386, United Virginia Bank account No. 080-04-978, and First Virginia Bank account No. 0774-0344), computers, safe, vehicles (including a 1986 Chevrolet Astro Van VIN No. 1GCDM15206B118910, a 1985 Chevrolet Blazer VIN No. 1G8CT18B4F0210345, and a 1986 Chevrolet Sprint VIN No. JG1MR6852-GK806925).

    (a) 804 Rockville Pike
    Rockville, Md.

    (b) 10288 Festival Lane
    Manassas, Va.

    (c) 6193 Livingston Rd.
    Oxon Hill, Maryland

    (d) 9156 Richmond Hwy.
    Ft. Velvoir, Va.

    (e) 8328 Richmond Hwy.
    Alexandria, Va.

    (f) 13711-A Jefferson Davis Hwy.
    Woodbridge, Va.

(g) 277 S. Van Dorn
Van Dorn Plaza
Alexandria, Va.

(h) 3525 S. Jefferson St.
Leesburg Pike Plaza
Bailey's Crossroads, Va.

(i) 13748 Smoketown Road
Dale City, Va.

IT IS FURTHER ORDERED that the Attorney General is authorized to seize the property and dispose of it in accordance with law.

IT IS FURTHER ORDERED that the United States shall publish notice of this Order and its intent to dispose of the property in such manner as the Attorney General may direct. Any person, other than the defendant, asserting a legal interest in the property shall, within thirty (30) days of the final publication of this notice, or his receipt of direct written notice, whichever is earlier, petition the Court for a hearing to adjudicate the validity of his alleged interest in the property. The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, and additional facts supporting the petitioner's claim, and the relief sought.

IT IS FURTHER ORDERED that following the Court's disposition of all petitions filed, or if no such petitions are filed following the expiration of the period specified for the filing of such petitions, the United States

shall have clear title to the property and may warrant good title to any subsequent purchaser or transferee.

Dated: 11/18/87

/s/ T. S. Ellis, III
UNITED STATES
DISTRICT JUDGE

By: /s/ Renee Spivey
Deputy Clerk

[redacted]

QUESTIONS PRESENTED FOR REVIEW

1. Is the Indiana criminal RICO statute (I.C. 35-45-6-1 *et seq.*, the Indian Corrupt Business Influence Act) as applied to obscenity offenses unconstitutionally vague in violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Does the use of obscenity or an obscenity related offense, other than child pornography, as a predicate offense of the Indiana RICO statute violate the First Amendment to the Constitution of the United States?

3. Is Indiana's criminal RICO statute violative of the First and Fourteenth Amendments to the Constitution of the United States to the extent that it allows prosecution for criminal RICO on the basis of two or more allegations of obscenity violations which have not been reduced to convictions?

4. Are the first amendment procedural safeguards of *Heller v. New York*, 413 U.S. 483 (1973) violated by a state law which allows the arrest and prosecution of an individual for criminal RICO based upon predicate allegations of obscenity violations, not reduced to conviction, without allowing, post-arrest, a prompt adversary hearing to determine the probable obscenity of items upon which the prosecution is based?

5. Is Indiana's civil RICO statute, authorizing pre-trial padlocking and post-trial forfeiture of entire communicative businesses solely on the basis of two or more obscenity offenses, facially unconstitutional under the First Amendment as a prior restraint on protected expression?

6. Do the forfeiture, padlocking and other sanctions of Indiana's civil RICO statute, constitute an overly broad means of regulating the dissemination of obscenity?

7. Do the Indiana civil RICO statute's pre-trial sanctions of mass seizure and padlocking lack sufficient First Amendment

procedural safeguards where they can be imposed based solely upon an *ex parte* probable cause determination of obscenity?

8. Do seizure, padlocking and forfeiture sanctions such as those upheld by the Indiana Supreme Court, violate the First Amendment by unduly chilling the exercise of protected expression?

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Nos. 87-470 and 87-614

IN THE

Supreme Court of the United States

October Term, 1987

No. 87-470

FORT WAYNE BOOKS, INC.

Petitioner,

v.

STATE OF INDIANA, et al.,

Respondents.

No. 87-614

RONALD W. SAPPENFIELD, et al.,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA AND THE INDIANA COURT OF APPEALS

BRIEF OF RESPONDENTS STATE OF INDIANA AND STEPHEN M. SIMS ON THE MERITS

OPINION BELOW

I.

SAPPENFIELD V. INDIANA

The decision of the Indiana Court of Appeals, First District, published at 505 N.E.2d 504 (1987) appears in the Appendix

hereto. (Consolidated Joint Appendix 176, hereinafter referred to as "J.A."). A timely petition for rehearing was filed and denied without opinion. (J.A. 182). A timely petition for transfer was filed with the Supreme Court of Indiana and was denied without opinion. (J.A. 183).

II.

FORT WAYNE BOOKS, INC. V. INDIANA

The decision of the Supreme Court of Indiana reported as *4447 Corporation v. Goldsmith* is published at 504 N.E.2d 559 (Ind. 1987) and is printed at pages 104-112 of the Appendix to the Petition for a Writ of Certiorari. The decision of the Indiana Court of Appeals is published at 479 N.E.2d 578 (Ind. App. 1985) and is printed at pages 28-98 of the Appendix to the Petition for a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

FIFTH AMENDMENT — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT § 1 — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The provisions of Indiana Code Chapter 34-4-30.5 (Indiana's civil RICO statute), Indiana Code Chapter 35-45-6 (Indiana's criminal RICO statute), and Indiana Code Section 35-49-2-1 (Indiana's statutory definition of obscene material) are set forth in Appendix A of this brief.

STATEMENT OF THE CASES
SAPPENFIELD V. INDIANA

In 1984 a local law enforcement officer purchased several magazines at two stores allegedly owned or operated by the Petitioners. The magazines contained graphic photographs of homosexual and hetersexual activity (*Sappenfield* Record 20-23, 65-275). After examining the magazines, the county prosecuting attorney filed criminal charges against the Petitioners alleging that the Petitioners had participated in the distribution of obscene material in violation of the criminal laws of Indiana (J.A. 135, 138-149). Among the eight counts of the charging information were two counts (Counts IV and VIII) which alleged violations of Indiana's Criminal RICO statute.

On June 4, 1985, the Petitioners moved to dismiss Counts IV and VIII (the RICO Informations) on the grounds, *inter alia*, that the RICO statute was unconstitutionally vague and violative of the Fourteenth Amendment (J.A. 150). On September 18, 1985, the trial court held that the RICO statute could not constitutionally be applied to violations of the Indiana obscenity statute (J.A. 173). The decision of the trial court was reversed by the Indiana Court of Appeals.

FORT WAYNE BOOKS, INC. V. INDIANA

Respondent Stephen M. Sims, as prosecuting attorney, secured 39 criminal convictions against various people employed by the Petitioner and others for distributing obscene material at certain business locations. On March 19, 1984, the prosecuting attorney filed a complaint in the Allen Circuit Court alleging that the Petitioner and other named defendants had engaged in a pattern of racketeering activity (J.A.8).

Following an *ex parte* hearing, the Allen Circuit Court found that probable cause existed to support a finding that the assets of the Petitioner were derived from or being used in a pattern of racketeering activity. The trial court ordered the seizure and inventory of Petitioner's assets.

The Petitioner participated in hearings before the trial court on March 29, 1984, and April 4, 1984 (Fort Wayne Record 478, 574). No trial date has been set by the trial court in this case because the Petitioner sought an Extension of Time Within Which to File an Answer to the Complaint (Fort Wayne Record 640), and immediately thereafter deprived the trial court of jurisdiction by initiating an interlocutory appeal (Fort Wayne Record 646).

SUMMARY OF THE ARGUMENT

This Court has consistently ruled that the states may prohibit the distribution of obscene material. Obscene communicative material is not entitled to First Amendment protection.

If Indiana can show that the Petitioners have engaged in the criminal act of distributing obscene material, then Indiana may impose criminal and civil sanctions against the Petitioners.

Indiana asserts that persons engaged in a pattern of criminal activity may not shelter the assets derived from or used in the criminal activity by combining the criminal activity with an enterprise which is entitled to First Amendment protection. Thus, a person who uses a newstand as a front for illegal gambling activities cannot prevent the government from seizing his place of business. Nor can a person who profits from the sale of illegal drugs invest the profits in a radio station and thereby prevent the government from tracing and seizing the profits. The question is whether criminal assets are secure from government seizure when the assets are invested in speech related activities.

ARGUMENT

I.

THE INDIANA OBSCENITY STATUTE

The Indiana Obscenity Statute (Ind. Code 35-49-2-1, App. A) is an almost direct enactment of this Court's main holding in the benchmark case of *Miller v. California* 413 U.S. 15 (1973). The elements of "obscene matter of performance" are whether:

> (1) The average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;
>
> (2) The matter of performance depicts or describes, in a patently offensive way, sexual conduct; and
>
> (3) The matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The statute specifies "contemporary community standards" as the test to determine whether the appeal to the prurient interest in sex is predominant. In *Smith v. United States* 431 U.S. 291 (1977) this Court added that "patent offensiveness" is also to be judged by the same standard. But *Smith v. U.S.* also pointed out that the third prong of the *Miller* test, the lack of serious literacy, artistic, political, or scientific value is *not* to be determined by that standard, but rather on the question whether a reasonable person would find such value in that material, taken as a whole. *Pope v. Illinois*, ___U.S. ___, 107 S.Ct. 1918 at 1921, (1987). *Miller* also required that a state must specifically define the "sexual conduct" whose depiction

or description is subject to being alleged obscene. Indiana has complied: The matter or performance must depict or describe "sexual conduct." Ind. Code 35-49-2-1(2). "Sexual conduct" is exactly defined in objective factual terms under Indiana Code 35-49-1-9 (App. A).

When Indiana's statutory scheme on obscenity is viewed as a whole, it clearly requires the existence of the depiction or description of the items described in Ind. Code 35-49-1-9. In other words, explicit sexual activity. This depiction must be so gross as to be "patently offensive". The matter in which it is imbedded must not only appeal as a whole to the interest in sex, but to the "prurient" interest therein; moreover, this must be the dominant theme of the work. Even so, such work still cannot predicate a RICO action unless it lacks serious literary, artistic, political, or scientific value.

Miller explicitly holds that works defined by the standard enunciated therein are not protected by the First Amendment. It seems to be a common tactic by persons subjected to an obscenity action to assert that one or another work, clearly outside the *Miller* standard or the given statute, and hence not subject to the State action, is within it, and postulate a hypothetical future prosecution of such works. in this instance, as we have seen, petitioners seek to dress their unprotected product in the First Amendment armor borrowed from *Playboy*, *Penthouse*, prospective 20th Century Fox or Universal films, and some hypothetical videotapes or books speculatively sold by Walden books or B. Dalton's. Overlooked is the fact that such material rarely depicts "sexual conduct" as defined by the statute, does not do so in a "patently offensive" way, does not lack the requisite value, and when taken as a whole does not appeal to the *prurient* (i.e., unhealthy) interest in sex.

Thus, taken either as a substantive penal statute directed against obscenity or as a predicate to RICO action, Indiana's criminal obscenity statutes are properly circumscribed to assure against encroachment on First Amendment grounds.

II.

INDIANA'S RICO STATUTES: VAGUENESS, OVERBREADTH CHILLING EFFECT

The Indiana RICO statute closely resembles the federal RICO legislation found at 18 U.S.C. § 1961 *et seq.*. The policy reasons for the adoption of RICO statutes are clearly set forth in *Russello v. United States*, 464 U.S. 16 (1983), and need not be repeated here. The federal RICO statute has withstood challenges for vagueness and overbreadth. *See U.S. v. Tripp*, 782 F.2d 38 (6th Cir. 1986) *cert. den.* 106 S.Ct. 1656; *U.S. v. Martino*, 648 F.2d 367, reconsidered in part 650 F.2d 651 (5th Cir. 1981) *cert. den.* 456 U.S. 943, 949, *on reh.* 681 F.2d 952 affirmed 104 S.Ct. 296; *U.S. v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978) *cert. den.* 441 U.S. 933.

Facially, Indiana's RICO statute is no broader or more vague than the federal legislation.

In *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794 (1985) this Court dealt with constitutional overbreadth and reaffirmed the following guidelines for review of state statutes:

1. Never anticipate a question of constitutional law in advance of the necessity of deciding it.

2. Never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

3. One to whom applicability of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.

4. The same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.

5. A law maybe narrowed by (1) legislative action, (2) judicial construction or (3) partial invalidation.

6. If a term in a statute is potentially overbroad, the law should be invalidated only so far as the term is to be understood as reaching protected materials.

7. Even if a term can only be interpreted in an unconstitutional sense, the proper remedy is to excise the term and leave the rest of the statute in place.

The danger most feared by the Petitioners is that a RICO civil action will close down and seize assets of an enterprise defined in the criminal RICO statute (IC 35-45-6-2) as being conducted though a pattern of racketeering activity; or an enterprise acquired or maintained, conducted, or derived through such activity. Among the complaints lodged in this Court about the RICO statute is that its effects are "Draconian." If so, this effect is unrelated to the nature of the business seized or the violation alleged as a predicate, and independent of any speech material that may be involved. RICO's purpose is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States*, *supra*. The federal RICO statute's provisions are to be liberally construed to effectuate its remedial purposes. *United State v. Turkette*, 452 U.S. 576 (1981). Indiana's Supreme Court has recognized that the seizure of assets acquired through racketeering was one of the statutes most important remedies. The mere contention that the RICO statute is a strong remedy does not establish that it is improper.

The Indiana Supreme Court in *Goldsmith v. 4447 Corporation*, 504 N.E.2d (1987) correctly recognized that First Amendment protections do not extend to any of the matter which can be used to predicate a RICO action based on obscenity dealing. As demonstrated at length above, Indiana's obscenity statute reaches only *unprotected* speech. Since no RICO predicate offense can infringe on First Amendment territory, the fact that a species of speech is involved in obscenity cannot be used to distinguish an obscenity racket from, for instance, a drug, prostitution, gambling or even an arson or murder for hire racket for purposes *either* of charging a criminal RICO violation *or* seizing assets of such an enterprise

derived from or conducted through a pattern of racketeering activity.

Petitioners and *amici* cite a number of obscenity and prior restraint cases going back as far as the classic *Near v. Minnesota*, 283 U.S. 697 (1931). What these cases all have in common, however, is that the prospective State action was explicitly premised on some content of the speech aspect of the material (or on prospective speech content in the *Near* and other prior restraint cases). The speech involved was sought to suppressed on the theory that it was obscene, or would be libelous, or would threaten public order. (E.g. *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977).

But a civil forfeiture and seizure action under RICO remedies does not concern the identity of the items seized. Its clear intent is to attack the incentive for racketeering enterprises by seizing the business stock of the enterprise and/or all property derived from the enterprise — what could best be called "ill gotten gains".

Goods so seized can be anything from a stock of stolen cars, auto parts, and repair manuals used in a stolen car "chop shop" racket, to school bonds or a collection of Picassos bought with the profits. The cars, parts, manuals, bonds and paintings should be and are equally subject to seizure and forfeit under the civil RICO act. This is so even though a Picasso painting is clearly an item of speech, and one with undeniable artistic value as well and hence is protected speech.

Petitioners are seeking nothing less than the creation of an exemption for an entire class of property from RICO seizure. They wish to appropriate the First Amendment and use its hard-won protections for the purpose of establishing a "safe" class of property that can be invested in and used in racketeering enterprises, or which can be purchased through the procedes of racketeering, secure from the threat of RICO seizure forfeiture. If the Court were to adopt the confusion between First Amendment prior restraint law and RICO seizures fostered by Petitioners it would be doing no less than opening the

entire field of First Amendment protected property and enterprises as safe havens — and thus targets — for investment of the procedes of organized crime. Racketeers could put their money in Byzantine icons or Renaissance religious art. They could buy speech-related businesses from bookstores to daily newspapers from video stores to TV networks. The clear purpose of the RICO statute would be vitiated if the defendant in a seizure action could prevent it by a claim that among the property was protected — or even just "presumptively protected" — speech.

The Indiana court in the 4447 case recognized this when it held "that the purpose of the forfeiture provisions is totally unrelated to the nature of the assets in question. The overall purpose of the anti-racketeering laws is unequivocal, even where the predicate offense alleged is a violation of the obscenity statute. The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity. Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene."

In making that holding, the Indiana court followed the holding of the Federal district court in *Western Business Systems, Inc. v. Slaton*, 492 F.Supp. 513 (N.D. Ga. 1980), which also held that any chattel derived from racketeering was subject to seizure "totally unrelated to their contents." The forfeiture, the district court held, was not due to any likelihood of obscenity, "but because they were personal property realized through or derived from crime." *Id.* at 514.

Petitioners, and to an even greater extent the *amici*, profess a fear that indiscriminate attacks on speech-related business might ensue based on sexually explicit but protected materials. It has already been shown that underlying obscenity statute is carefully drafted to include only the material that this Court has held, in *Miller* and elsewhere, to be unprotected.

Parties and *amici* present no suggestion that any of the seizures that occurred in these cases was based on predicate

material that actually was subject to First Amendment protection. There is no showing of any prospect that a film studio or theatre business would be shut down for distribution of Bertolucci's *Last Tango in Paris* or Nichol;s *Carnal Knowledge*; or that a bookstore or chain of stores would be seized for selling *Penthouse* or even such sexually explicit material as Anais Nin's frankly acknowledged erotic writings titled *Delta of Venus*. Indeed, all these titles have been available to adults in Indiana without suppression by the State.

Indiana's statute, in short, provide for judicial determination that there is probable cause to believe that an enterprise has knowingly and intentionally undertaken a pattern of distribution of obscene matter as a criminal offense. While it is true that probable cause was shown *ex parte* in these cases, it is also true in general that an opportunity for adversary consideration of the status of the predicate allegedly obscene matter was rejected in favor of pursuing these interlocutory actions. There is no reason to thus assume that, when predicate matter is seized or brought as evidence of a violation of IC 35-49-3-1 as a basis for RICO actions rather than direct obscenity violations, in such cases an adversary hearing is not available to the defense to examine the predicate matter. There is no reason, however, to provide such a hearing for the business assets seized under the RICO act since, as shown above, First Amendment issues are not relevant.

Since Indiana's obscenity statute is carefully circumscribed so as to affect only unprotected speech, and provides a clear workable definition of what is obscene, neither it nor RICO criminal and civil actions predicated upon it are unconstitutional. The racketeer has control over what business stock to acquire for his racket or into what goods he will invest his racketeering procedes. If First Amendment protected matter is chosen by him, then that is his choice, not the State's. The government ought to be able to pursue racketeering procedes no matter into what form the racketeer has chosen to convert them. The State action in seizing them is directed against that choice, not against their content. Since content of the matter

seized under RICO is irrelevant to the action, then can be no constitutional objection based on their content. Indiana's obscenity and RICO statutes, facially and as interpreted, are not improper.

III.

EX PARTE HEARING AND SEIZURE

The Petitioners contend that Indiana's RICO statutes are deficient 1) because they do not require that an *adversary hearing* on the question of obscenity *precede* a seizure under the statute, 2) because they do not guarantee that the restraint imposed will be of *short duration*, 3) because they do not ensure *prompt appellate review* of either interim or permanent seizure orders, and 4) because the statute does not require that the State satisfy a standard of proof greater than the probable cause standard.

Indiana's RICO statute should not be invalidated simply because it does not require that a seizure be preceded by an adversary, as opposed to *ex parte*, hearing on the issue of obscenity. *Heller v. New York*, 413 U.S. 483 (1973) indicates that a statutory scheme which 1) provides that seizure is to be preceded by a judicial determination of probable cause, and 2) makes *available the opportunity for post-seizure review* in an *adversary* proceeding, is sufficient for First Amendment purposes. 413 U.S. 489, 492-493. While *Heller* is distinguishable from the case at bar by virtue of the fact that the seizure in *Heller* was accomplished in order to preserve evidence for trial, 413 U.S. at 491, the Supreme Court's discussion of the type of hearing which is required in order to safeguard First Amendment rights is instructive. After noting that it had earlier held that only a judicial determination in an adversary setting is sufficient to impose "a valid *final restraint*" (Emphasis added), the *Heller* Court explained that it had *not* required, and by implication was not going to require "that the advisory hearing taken place prior to *initial* seizure". 413 U.S. at 490.

Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) 1723, 12 L.Ed.2d 890, and *Marcus v. Search Warrants of*

Property at 104 East 10th St., Kansas City, MO, 367 U.S. 717 (1961) held, as the Court explained in its decision in *Heller*, that a seizure of a large quantity of books "for the sole purpose of their destruction" requires "*a prior judicial determination of obscenity in an advisory proceeding*". *Heller*, 413 U.S. at 492. In *Heller* the Court reaffirmed this requirement, stating "We do not disturb this holding. Courts will continue to scrutinize my large-scale seizure of books, films or other materials presumptively protected under the First Amendment to be certain that the requirements of a *Quantity of Books* and *Marcus* are fully met." *Heller*, 413 U.S. at 492. *Marcus* and a *Quantity of Books* are factually distinguishable from *Heller* and *Fort Wayne Books*, because they each involved seizures which were not based upon a prior and independent judicial determination of obscenity.

Further, as noted in *Heller*:

> The necessity for a prior judicial determination of probable cause will protect against gross abuses, while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guarantees, with only a minimal interference with public circulation pending litigation.

(402 U.S. at 367).

In the *Sappenfield* case, there has been *no ex parte* hearing resulting in a seizure of assets. In the *Fort Wayne Books, Inc.* case, the Petitioner was provided with an immediate adversary hearing. (*See Statement of the Case, supra*). Any delay in the ultimate resolution of factual issues in *Fort Wayne Books* is attributable to the Petitioner who instituted an interlocutory appeal.

Petitioner's reliance on *California ex rel. Cooper v. Mitchell Bros.*, 454 U.S. 90, (1981), at 93, is apparently misplaced. The Petitioner's reliance is misplaced for the very reason indicated in his Petition for Certiorari; the Supreme Court "did not resolve the question of the minimal standard of proof that is

constitutionally required" to permanently restrain exhibition of a specific allegedly obscene film. Other cases, however, such as *Heller*, 413 U.S. at 494, and *New York v. P.J. Video, Inc.*, 106 S.Ct. 1610, at 1614-1616 (1986), strongly suggest, if they do not dictate, that the probable cause standard is sufficient to protect First Amendment rights. *See also*, *United States v. Spilotro*, 680 F.2d 612 (9th Cir. 1982), and *United States v. Long*, 654 F.2d 911 (3d Cir. 1981).

IV.

LEGITIMATE STATE INTERESTS

As noted by this Court in *Russello*, *supra*, state and federal governments have a strong and legitimate interest which is expressed in RICO legislation.

There is no evidence that Indiana's inclusion of obscenity as one of the predicate RICO offenses was a pretext for simply closing adult bookstores, (*See* Concurring Opinion of Justice O'Connor in *Arcara v. Cloud Books* 106 S.Ct. 3172 at 3177 (1986), in which it was pointed out that such a pretexual use of a *nuisance* statute would implicate First Amendment concerns), and the RICO statute's forfeiture provision does not discriminate with regard to the content of the property to be seized and ultimately forfeited. The United States District Court for the Southern District of Georgia, in its opinion in *Western Business Systems v. Slayton*, 492 F.S. 513, at 514 (1980 N.D. Ga) followed just such an approach in rejecting the argument that Georgia's RICO statute constituted an unconstitutional prior restraint as applied to the predicate offense of obscenity:

> At this preliminary point in the litigation, it seems to the court that plaintiffs have grounded the prior restraint portion of their case on a misreading of the statute. Plaintiffs' argument assumes that printed materials would be subject to forfeiture under GA.Code 26-3405 because the owner-operator had two prior obscenity convictions in connection with this or other businesses, and the forfeited materials were used in the same kind of business. They argue that the statute thus allows forfeiture of printed

> matter on the basis that it is probably obscene, and therefore this constitutes a prior restraint. This attempted reading does great violence to the words of the statute.
>
> As the court reads the statute, Ga.Code § 26-3403 prohibits the acquisition even of legitimate businesses with the proceeds of racketeering (as defined). *Under § 26-3405 all property, of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds, is subject to forfeiture to the state. These chattels might be anything from from gardening equipment to cook books, and might also be sexually explicit materials. Forfeiture could apply to any chattel whatever, if it was acquired with the proceeds of racketeering. Thus, if the items seized are books or movie films, the seizure is totally unrelated in their contents. They would be forfeited under the statute not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime.*
>
> Similarly, the law enforcement officer authorized by § 26-3405(d)(2) to seize materials prior to the filing of a complaint would be seizing them upon probable cause to believe that they were subject to forfeiture, and not—as plaintiffs argue—upon his personal judgment that the objects are obscene. We must keep in mind that these objects may be anything.

(Emphasis added). The Idaho Supreme Court's decision in *State ex rel. Kidwell v. U.S. Marketing Inc.* (1981), Idaho, 631 P.2d 622, at 628-629, contains an excellent general discussion of civil forfeiture actions and prior restraint, and also accepts the premise that the state may impose a forfeiture "on neutral and innocent property used in the commission of forbidden acts."

CONCLUSION

While it is possible for this Court to hold that communicative material can only be seized after an opportunity for an adversary hearing, such a holding is not mandated by the Constitution and is not support by case law of this Court. (Such a holding would require a striking down of the statutory provi-

sion for an *ex parte* hearing, not a striking down of the provision establishing obscenity as a predicate offense.)

Petitioners have shown no logical or constitutional basis for holding that property used in or gained from a criminal activity (distributing obscene material) should be protected while other property derived from or used in criminal activities may be forfeited.

It is intended that RICO statutes have a chilling effect only on certain criminal activities including the distribution of obscene material. There has been no showing by the Petitioners that the RICO legislation is any more restrictive or chilling than Indiana's general obscenity statute.

The orders entered by Indiana courts under Indiana's RICO statutes are directed against property which allegedly has been used in or derived from a pattern of criminal activity. (The Petitioners have not been enjoined from any activity, and both are currently engaged in the business of selling books.) It is the criminal activities of the Petitioners or their employees which triggers the imposition of RICO sanctions against the property. The First Amendment does not protect the Petitioners from the consequences of participating in criminal activity.

The Indiana RICO statute should be upheld in its entirety.

Respectfully submitted,

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APPENDIX A
INDIANA CIVIL AND CRIMINAL RICO STATUTES

CHAPTER 30.4
CIVIL REMEDIES FOR RACKETEERING ACTIVITY

Sec. 1. As used in this chapter: "Aggrieved person" means a person who has an interest in real property or in an enterprise that:

(1) Has suffered damages or harm as a result of corrupt business influence (IC 35-45-6-2).

"Enterprise" means the same as the definition of that term found in IC 35-45-6-1.

Sec. 2. The prosecuting attorney in a county in which the violation occurs, may bring an action to enjoin a violation of IC 35-45-6-2. An action under this section may be brought in any circuit or superior court in a county in which the violation occurs. If the court finds by a preponderance of the evidence that a violation of IC 35-45-6-2 has occurred, it may:

(1) Order a defendant to divest himself of any interest in any enterprise or real property;

(2) Impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) Order the dissolution or reorganization of any enterprise;

(4) Order the suspension or revocation of a license, permit or prior approval granted to any enterprise by any agency of the state;

(5) Order the forfeiture of the chapter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of

directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) Make any other order or judgment that the court considers appropriate.

In any order or judgment made by the court under this section, the judge shall make due provision for the rights of innocent persons.

Sec. 3. (a) The prosecuting attorney in a county in which any of the property is located may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-1. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violatio of IC 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred.

Sec. 4. (a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. Seizure may be made without court order only if:

(1) The seizure is incident to a lawful arrest or search, or to an inspection under an administrative inspection warrant; or

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter.

(b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:

(1) Place the property under seal;

(2) Remove the property to a place designated by the court; or

(3) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(c) Property seized under subsection (a) is not subject to [replevin], but is considered to be in the custody of the law enforcement officer making the seizure, subject only to order of the court. However, if a seizure of property is made in accordance with subsection (a), the prosecuting attorney shall promptly bring an action for forfeiture under section 3 [34-4-30.5-3] of this chapter. If an action is not filed within one hundred eighty [180] days after the date of the seizure, the law enforcement agency whose officer made the seizure shall return the property to its owner.

Sec. 5. (a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable

damage to the aggrieved person is not require. The court may order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

(b) An aggrieved person may bring an action against a person who has violated IC 35-45-6-2 in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located, for damages suffered as a result of corrupt business influence. Upon a showing by a preponderance of the evidence that the aggrieved person has been damaged by corrupt business influence, the court shall order the person causing the damage through a violtion of IC 35-45-6-2 to pay to the aggrieved person:

(1) An amount equal to three (3) times his actual damages;

(2) The costs of the action;

(3) A reasonable attorney's fee; and

(4) Any punitive damages awarded by the court and allowable under law.

(c) The defendant and the aggrieved person are entitled to a trial by jury in an action brought under this section.

(d) An aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state has in the same property or proceeds.

(e) If the state is an aggrieved person, the attorney general has concurrent jurisdiction with the prosecuting attorney to bring an action under this section.

Sec. 6. In any action brought under this chapter, the principle of collateral estoppel operates to bar relitigation of the issues previously determined in a criminal proceeding under IC 35-45-6-2.

CHAPTER 6
RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
(CRIMINAL RICO STATUTE)

Sec. 1. As used in this chapter:

"Documentary material" means any document, drawing, photogrph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) Sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) Union, association, or group, whether a legal entity or merely associated in fact.

"Pattery of racketeering activity" means engaging in at least two [2] incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five [5] years after a prior incident of racketeering activity.

"Racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation, of a provision of IC 23-2-1, or of a rule or order issued under IC 23-2-1; a violation of IC 35-47; a violation of IC 35-49-3; murder (IC 35-42-1-1); battery as a class C felony (IC 35-42-2-1); kidnapping (IC 35-42-3-2); child exploitation (IC 35-42-4-4); robbery (IC 35-42-5-1); arson (IC 35-43-1-1); burglary (IC 35-43-2-1); theft (IC 35-43-4-2); receiving stolen property (IC 35-43-4-2); forgery (IC 35-43-5-2); fraud (IC 35-43-5-4); bribery (IC 35-44-1-1); offical misconduct (IC 35-44-1-2); conflict of interest (IC 35-44-1-3); perjury (IC 35-44-2-1); tamper-

ing (IC 35-44-3-4); intimidation (IC 35-45-2-1); promoting prostitution (IC 35-45-4-4); promoting professional gamblins (IC 35-45-5-4); dealing in cocaine or a narcotic drug (IC 35-48-4-1); dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2); dealing in a schedule IV controlled substance (IC 35-48-4-3); dealing in a schedule V controlled substance (IC 35-48-4-4); or dealing in marijuana, hash oil, or hashish (IC 35-48-4-10).

Sec. 2. (a) A person:

(1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C felony.

INDIANA CODE SECTION 35-49-2-1

DEFINITION OF OBSCENE MATTER OR PERFORMANCE

Sec. 1. A matter of performance is obscene for purposes of this article if:

(1) The average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;

(2) The matter or performance depicts or describes, in a patently offensive way, sexual conduct; and

(3) The matter of performance, taken as a whole, lacks serious literary, artistic, political, or scientific value. [IC 35-49-2-1, as added by P.L. 311-1983, 33.]

Indiana Code Section 35-49-3-1. A person who knowingly or intentionally:

(1) Sends or brings into Indiana obscene matter for sale or distribution; or

(2) Offers to distribute, distributes, or exhibits to another person obscene matter;

commits a class A misdemeanor. However, the offense is a class D felony if the obscene matter depicts or describes sexual conduct involving any person who is or appears to be under sixteen [16] years of age.

Indiana Code Section 35-49-1-9 "Sexual conduct" means:

(1) Sexual intercourse or deviate sexual conduct;

(2) Exhibition of the uncovered genitals in the context of masturbation or other sexual activity;

(2) Exhibition of the uncovered genitals of a person under sixteen [16] years of age;

(4) Sado-masochistic abuse; or

(5) Sexual intercourse or deviate sexual conduct with an animal.

Supreme Court, U.S.
FILED
AR 7 198

In the Supreme Court of the United States

October Term, 1988

TOM WAYNE SCOTT, Etc.,
Petitioner,

against

State of INDIANA,
Supreme Commission, *et al.*,
Respondents.

On Writ of Certiorari
to the Supreme Court of Indiana

BRIEF FOR RESPONDENT
IN OPPOSITION

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QUESTIONS PRESENTED

In 1983, the prosecutor for Marion County, Indiana, filed a civil action against the 4447 Corporation and others. Previously, police officers had purchased, on several occasions, sexually explicit films at adult stores owned by the defendants. The prosecutor's action sought the civil forfeiture of assets acquired or maintained by an "enterprise" engaged in a "pattern of racketeering activity," that is, multiple sales of "obscenity." He also sought divestiture of other assets, the suspension of certain licenses, and the forfeiture of certain corporate charters. The defendants' future expressive conduct was not to be restricted. Trial was set for 72 hours after the action was filed. As part of his action, the prosecutor obtained a pretrial order that permitted defendants to continue to operate in the normal course of their business, but restrained them from dissipating their assets before final judgment.

Restated, four issues are presented:

(1) Did the incorporation of "obscenity" into Indiana RICO make it unconstitutionally vague on its face? (no)

(2) Did the preliminary restraining order issued under Indiana RICO constitute an impermissible prior restraint on free speech under the First and Fourteenth Amendments? (no)

(3) Would the granting of the final forfeiture order under Indiana RICO constitute an impermissible prior restraint on free speech under the First and Fourteenth Amendments? (no)

(4) Would the granting of the final divestiture, suspension of license, and forfeiture of corporate charter order under Indiana RICO constitute an imper-

missible prior restraint in free speech under the First and Fourteenth Amendments?* (no)

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* The parties of record include as appellants in the Indiana Supreme Court:

4447 Corporation, World Video Systems, I.S.S.I. Theatre Corporation, Plaza Entertainment Center, Burton Gorelick, Cinema Blue of Fort Wayne, Inc., Erotic House Bookstore, Inc., Fort Wayne Books, Inc.

The parties of record include as appellees in the Indiana Supreme Court:

The State of Indiana; Stephen Goldsmith, Prosecuting Attorney for the 19th Judicial Circuit, and Stephen M. Sims, Prosecuting Attorney for the 38th Judicial Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-470

FORT WAYNE BOOKS, INC.,
Petitioner,

-against-

STATE OF INDIANA,
STEPHEN GOLDSMITH, *et al.*,
Respondents.

On Writ of Certiorari
to the Supreme Court of Indiana

BRIEF FOR RESPONDENT STEPHEN GOLDSMITH

OPINIONS BELOW

The Indiana Supreme Court's opinion is reported at *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987). The order and opinion denying rehearing are reported at 509 N.E.2d 174 (Ind. 1987). The Indiana Court of Appeals' opinion is reported as *4447 Corporation v. Goldsmith*, 479 N.E.2d 578 (Ind. App. 1985).

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on March 2, 1987. Rehearing was denied on June 18, 1987. A petition for certiorari was filed within 90 days. It was granted on March 7, 1988. 108 S. Ct. 1106. Jurisdiction of this Court rests on 28 U.S.C. § 210(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Statute

The text of the *Ind. Code Ann.* §§ 35-45-6-1, 34-4-30.5-1 (Burns Supp. 1982) is printed in Appendix A to this brief.

STATEMENT OF THE CASE

This petition reviews two separate civil actions consolidated by the Indiana Court of Appeals. This brief deals solely with the proceeding brought against the 4447 Corporation, I.S.S.I. Theatre Corporation, Plaza Entertainment Center and Burton Gorelick ("the Gorelick defendants"), which was initiated by Respondent Stephen Goldsmith ("Goldsmith"). Goldsmith filed a civil action against the Gorelick defendants. (R. 103).[1] He sought

[1] Citations to the Record are as follows:
R. refers to the Joint Appendix.
A. refers to Appendix B to this brief.

certain injunctive, forfeiture and suspension or revocation relief. (R. 112). While permitting conduct in the normal course of their business to continue, he also sought to prevent the dissipation prior to judgment of assets that were subject to forfeiture. (R. 111-12). The trial court granted the preliminary order. (A. 3) An appeal was immediately taken; the proceedings were consolidated with litigation brought against Petitioner Fort Wayne Books, Inc.; and the Court of Appeals continued the preliminary relief. (R. 134) The Court of Appeals reversed. 479 N.E.2d 578. In turn, the Indiana Supreme Court reversed the Court of Appeals. 506 N.E.2d 559. This Court then granted certiorari. 108 S. Ct. 1106.

The Gorelick defendants were alleged to own and run several so-called adult bookstores and video retail stores in Indianapolis, Indiana. (R. 105-06). The stores were operated solely for the purpose of distributing sexually explicit material and sexual aid devices. The three stores in question were Burton Gorelick and I.S.S.I. Theatre Corporation, doing business as Adult Toy and Gift, and located at 6755 E. 38th Street; 4447 Corporation, doing business as World Video Systems, and located at 4447 N. Keystone; and a store that was being constructed, but had not yet opened, Plaza Entertainment Center, located at 4276 W. 38th Street. (R. 105-06). Nothing in the record indicates that these stores, which were operated as a unit, distributed any other materials that had any arguably serious literary, artistic, political or scientific value.

On July 25, 1983, Detective Sergeant Thomas R. Rogers of the Indianapolis Police Department was alleged to have entered the Adult Toy and Gift store. (R. 117). Rogers could immediately see the store's display of sexually explicit magazines, books, video tapes, films and sexual aid devices, all of which was available for sale to the public. (R. 117). Rogers purchased two films, "Anal Madness" and "Spin the Bottle". (R. 117). The covers

of the films graphically displayed deviate sexual acts. (R. 117). In the films, men and women performed sexual intercourse and deviate sexual acts. (R. 117). The clerk in the store acknowledged that the covers accurately depicted the contents of the materials. (R. 117).

Rogers approached a "conversation booth" within the "live peep" section of the Adult Toy and Gift store. (R. 117). The booth was divided into two sections with a telephone allowing conversation between the sections. (R. 117). Rogers entered the booth and spoke to a female identified as "Shawn" in the other section of the booth. (R. 117). Shawn instructed Rogers to put money inside a coin operated machine that controlled the lights to the other section. (R. 117). When Rogers inserted money into the device, the lights came on in Shawn's side of the booth, and they gave Rogers a full view of her. (R. 117). Shawn then told Rogers that for a "tip" she would "get naked" for him. (R. 117). Rogers paid Shawn more money, and Shawn removed all of her clothing. (R. 117). Shawn laid down on the floor, spread her legs and genitals apart with her fingers, and she exposed her private parts and anus to Rogers. (R. 117-18). Shawn then proceeded to masturbate until the time expired on the coin operated light machine. (R. 118).

Rogers turned his investigation to the World Video Systems store. (R. 118). There, Rogers encountered a similar wide array of sexually explicit materials, all of which were available for sale to the public. (R. 118). Rogers talked with the manager, Cynthia Smith, about a video tape, called "Hot Summer Night," which was on public display. (R. 118). Smith informed Rogers that he probably would not like the film because "it was pretty rough." (R. 118). Consequently, Rogers purchased two other films, entitled "Afternoon Delight" and "Sexual Negotiations." (R. 118). The covers of the films showed in detail sexual acts. (R. 118). In the films, men and women performed sexual intercourse and deviate sexual acts. (R. 118).

The next day, Rogers returned to Adult Toy and Gift store. (R. 119). He purchased two more films, entitled, "Big Load" and "Gyro Sex." (R. 119). In these films, men and women performed sexual intercourse and deviate sexual acts. (R. 119).

Meanwhile, Officer Steve Verplank went to World Video Systems. (R. 119). He purchased "Hot Summer Nights," the same film that Rogers had discussed with Smith the previous day. (R. 119). In this tape, four men raped a young woman and forced her to perform oral sex with them. (R. 119). The men also beat the woman with a belt. (R. 119).

Nothing in the record indicates that the films purchased by the detectives at the two stores had any arguably serious literary, artistic, political or scientific value.

On July 29, 1983, Detective Joseph Brannon began an investigation of the new store. (R. 119). He went to the Plaza Entertainment Center. (R. 119). The store appeared to be open for business, and Brannon discovered magazines, films and other sexually explicit material ready for sale to the public. Upon entering the store, however, Brannon saw that construction on the building was not finished. (R. 119). One of the workers told Brannon that the store would be opening the following Monday, August 1. (R. 119). The worker also showed Brannon the mini-theatre section, which was scheduled to be completed in the following months; he also showed him the "live peep" section, where customers could pay to see women perform sex acts. (R. 119-20).

Rogers continued his investigation, which consisted of interviews and obtaining various papers, records, applications and other legal documents, which related to Adult Toy and Gift and World Video Systems. (R. 120). These interviews and documents established that the Gorelick defendants owned and operated these two stores and the one to be opened. (R. 120).

On Monday, August 1, 1983, Goldsmith, Prosecuting Attorney for the Nineteenth Judicial Circuit of Indiana, filed a civil action in Marion Circuit Court under *Ind. Code Ann.* § 34-4-30.5-3(a) (Burns Supp. 1982). (R. 103). Goldsmith's complaint alleged that the Gorelick defendants, the various individuals and corporations, constituted an "enterprise," a group of related individuals and corporations that operated as a continuing unit, which was engaged in a "pattern of racketeering activity." (R. 107-08). The pattern of racketeering activity consisted of the commercial distribution and exhibition of obscene materials, including live paid sexual performances, which were tantamount to prostitution. (R. 108-10). Goldsmith sought various forms of civil relief, including injunctions, divestiture, forfeitures and suspension or revocation of licenses and corporate charters. (R. 111-12).

On the same day, Goldsmith filed a Verified Petition for Seizure of Property Subject to Forfeiture. (R. 113). The petition was designed to freeze, prior to final judgment, the assets of the Gorelick defendants; it also required them to prepare an inventory of their real and personal property. (R. 115-16). In support of this petition, Goldsmith submitted the affidavit of Detective Rogers and the films that the officers had purchased from the Gorelick defendants' stores. (R. 114).

After reviewing the materials submitted to the Court, including viewing the films, the Marion Circuit Court found that there was probable cause to believe that the Gorelick defendants had violated the Indiana statute. (A. 2-3). The Court then ordered the Gorelick defendants to preserve all property located at Adult Toy and Gift and World Video Systems. (A. 3). Specifically, the Court directed the Gorelick defendants not to "transfer or remove from said buildings any fixtures, cabinets, cameras, audio or video equipment, cash registers or other property until further order of the court." (A. 3). The

Court, however, specifically limited its freeze order to non-expressive material, emphasizing that its order did "not prevent [the Gorelick defendants] from transferring or selling books, magazines, newspapers or video tapes." (A. 3). The Court also ordered the police to secure all property within the unopened Plaza Entertainment Center. (A. 3). Trial was set for 72 hours later, the following Thursday, August 4, 1983. (A. 3).

Despite the need for a quick adjudication of Goldsmith's claims, the Gorelick defendants delayed the trial on the merits. (R. 121). First, they intervened in the proceedings on August 4, 1983, and they moved to continue the date of the trial. (R. 121). Having succeeded, the Gorelick defendants then moved for a change of venue, which resulted in the transfer of the proceeding to the Hamilton Circuit Court. On September 8, 1983, Goldsmith filed an amended complaint, narrowing the scope of the remedies he sought, but not otherwise altering the basic character of the proceedings. (R. 123). Goldsmith abandoned his request for general injunctive relief. (R. 129-30). Instead, he requested an order limited to preventing the dissipation of assets "without prior approval of the Court." (R. 129-30). The Gorelick defendants then moved to dismiss the Complaint and to vacate the Court's freeze order. They contended that the Indiana statute and the freeze order infringed upon their right to freedom of speech under the First and Fourteenth Amendments to the United States Constitution. *4447 Corp. v. Goldsmith*, 504 N.E.2d 559, 562 (Ind. 1987).

After an adversarial hearing, on December 21, 1983, the Hamilton court denied both motions to dismiss and the motion to vacate the freeze order. Pursuant to Ind. R. App. P. 4(B)(6), the Court then certified for appeal the question of whether a court order freezing assets can properly be issued based upon obscenity violations that have not been litigated. The Court of Appeals granted a

stay of the Circuit Court order sealing the unopened store, but continued the freeze order, and the Gorelick defendants pursued their interlocutory appeal. (R. 133).

The Indiana Court of Appeals consolidated the Gorelick defendants' proceeding with the Fort Wayne Books, Inc. proceedings.[2] The Court of Appeals struck down the Hamilton court's freeze order. *4447 Corporation v. Goldsmith*, 479 N.E.2d 578, 585 (Ind. App. 1985). The Indiana Supreme Court, however, reversed the Court of Appeals, and it held that the Indiana statute did not violate the defendant's free speech rights by allowing, subject to constitutionally appropriate procedures, the forfeiture of assets based upon a predicate offense of "obscenity." *4447 Corp. v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987). This Court then granted certiorari. 108 S. Ct. 1106.

[2] However similar, the two proceedings are distinguishable in crucial aspects. Most importantly, Goldsmith did not seek to prohibit the Adult Toy and Gift store and the World Video Systems from continuing to operate. Nor did the trial court's order attempt to prevent the Gorelick defendants from continuing their business. Goldsmith did not attempt to seize any expressive materials, and he only sought to prevent certain assets from being dissipated before judgment. Moreover, an adversary trial would have taken place 72 hours after the Complaint and Petition were filed, but it was delayed, not because of conduct of Goldsmith, but by the motions and related procedural efforts of the Gorelick defendants. The differences in the three cases accepted for *certiorari* are summarized in the chart at the end of this section.

Defendants	Case Type	Previous Convictions	Pretrial Orders: Re Books	Pretrial Orders: Other Assets	Stay & Pretrial Appeal
1. Ft. Wayne Books (3 stores)	Civil	39	Yes	Yes	Yes
2. Sappenfeld (Kokomo)	Criminal	No	No	No	Yes
3. 4447 Corp. et al. D/B/A	Civil				
World Video		No	No	Yes	Store Burned
Adult Toy & Gift		No	No	Yes	Yes [2]
Plaza Entertainment		No	No [1]	Yes	Yes [2]

[1] Court set hearing 72 hours after filing on whether new store should open; restricted sales from that *place* (new store) only until hearing.

[2] Stores closed by guilty plea to federal RICO (arson, mail and tax fraud). *See U.S. v. Gorelick*, IP86-29-CR-01, S.D. Ind.; state action continues against other defendants.

SUMMARY OF ARGUMENT

Indiana's RICO statute is modeled on similar Federal and state RICO legislation. Congress enacted the Organized Crime Control Act in 1970. Title IX of the 1970 Act is known as "RICO." Since 1970, a majority of states, including Indiana, have adopted similar, but not identical, legislation. RICO legislation is designed to curtail the infiltration of organized crime into legitimate businesses, but its scope is not confined to that purpose. RICO legislation applies to patterns of unlawful conduct by, through, or against enterprises; its enforcement mechanisms include a variety of criminal and civil sanctions.

In 1970, Congress did not include "obscenity" among RICO's predicate offenses. In 1984, Congress added "obscenity" to RICO's list of predicate offenses, since by

then it had become a major source of income for organized crime figures.

Twenty states, including Indiana, incorporate "obscenity" among the predicate offenses of their RICO statutes.

Federal RICO is enforced by criminal forfeiture. A number of the state statutes, including Indiana's, embody criminal, and civil forfeiture. Criminal and civil forfeitures are an often-used and a well-recognized form of sanction, whose basic constitutionality is today recognized to be beyond serious question.

RICO legislation is not vague in itself. Nor does RICO legislation become vague when "obscenity" is made a predicate offense, since "obscenity" is not vague.

A pretrial restraining order that freezes assets subject to seizure that are not expressive, and that permits the continuation of a business during the course of litigation is not an impermissible prior restraint on free speech.

A civil forfeiture order under RICO legislation is not an impermissible prior restraint on free speech where the legislation falls within the constitutional power of a state, the order furthers a substantial governmental interest, the interest is unrelated to free expression, and the order's incidental impact on free expression is not greater than necessary under the circumstances.

Similarly, civil orders that require the divestiture of assets, the suspension or revocation of licenses, or the forfeiture of corporate charters, but do not restrict future expressive conduct, do not constitute an impermissible prior restraint on free speech, since the order's incidental impact on free expression is not greater than necessary under the circumstances.

ARGUMENT

I. RICO LEGISLATION IS NOT LIMITED TO EITHER ORGANIZED CRIME OR THE INFILTRATION OF LEGITIMATE BUSINESS

A. Background of RICO

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." It is codified at 18 U.S.C. §§ 1961-68 (1982).[3] Since 1970, a majority of the states, including Indiana, have adopted similar, but not identical, legislation.[4] Even so, criminal and civil litigation under the legislation is a relatively recent phenomenon. It will be helpful, therefore, to set out the legislative background of the Federal and state statutes.

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[3] *See generally*, Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L. Q. 1009 (1980) (cited as "Basic Concepts"); Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982) (cited as "Civil Action").

At first, the Department of Justice moved slowly to use RICO criminally. Today, it is the prosecutor's tool of choice in organized crime, political corruption, white-collar crime, terrorism, and hate-group prosecutions. *See Oversight on Civil RICO Suits*, Hearings Before the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 109-11 (1985) (testimony of Assistant Attorney General Stephen S. Trott). The Department of Justice has also begun to implement the civil provisions. *See, e.g., United States v. Local 560, International Brotherhood of Teamsters*, 581 F. Supp. 279 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985) (civil suit against organized crime controlled union), *cert. denied*, 106 S. Ct. 2247 (1986).

[4] Twenty-seven states have adopted legislation similar, but not identical to, Federal RICO. The statutes are analyzed and compared in Appendix A to Blakey and Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim—Will Civil RICO be effective Only Against White Collar Crime?*, 62 Notre Dame L. Rev. 526, 596 (1987).

The "legislative history [of Federal RICO] clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States*, 464 U.S. 16, 26 (1983). "[T]he major purpose of Title IX . . . [was] to address the infiltration of legitimate business by organized crime." *United States v. Turkette*, 452 U.S. 576, 591 (1982).[5]

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[5] But Congress wanted to reach both "legitimate" and "illegitimate" enterprises. *Turkette*, 452 U.S. at 590. "[R]ejected [also has been the] notion [that RICO] applies only to organized crime in the classic 'mobster' sense." *United States v. Grande*, 620 F.2d 1026, 1030 (4th Cir.), *cert. denied*, 449 U.S. 919 (1980). *See also, Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 (1985) ("not just mobsters"). In addition, the "courts are all but unanimous in their refusal to read RICO as prohibiting *only* the infiltration of legitimate organizations . . ." *United States v. Altomare*, 625 F.2d 5, n.7 (4th Cir. 1980) (emphasis added). *See also, Turkette*, 452 U.S. at 591. RICO, in short, applies to enterprise criminality, that is, patterns of unlawful conduct by, through, or against enterprises. *See United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); Goldsmith, *RICO and Enterprise Criminality*, 88 Col. L. Rev. 774 (1988).

RICO fits well into a consistent practice of the Congress over the past half century of enacting legislation aimed at a specific target, but made applicable generally. *See, e.g.*, 18 U.S.C. § 244 (sports bribery) held not limited to organized crime in *United States v. Walsh*, 544 F.2d 156, 159 (4th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977); 18 U.S.C. § 841-48 (explosives) held not limited to organized crime in *United States v. Schwanke*, 598 F.2d 575, 578 (10th Cir. 1979); 18 U.S.C. § 891 (loan sharking) held not limited to organized crime in *United States v. Keresty*, 465 F.2d 36, 43 (3d Cir.), *cert. denied*, 409 U.S. 991 (1972); 18 U.S.C. § 1510 (obstruction of criminal investigation) held not limited to organized crime in *United States v. Koehler*, 544 F.2d 1326, 1330 n.6 (5th Cir. 1977); 18 U.S.C. § 1951 (extortion) held not limited to racketeering in *United States v. Culbert*, 435 U.S. 371, 373-74 (1978); 18 U.S.C. § 1952 (Travel Act) held not limited to organized crime bribery in *Perrin v. United States*, 444 U.S. 37, 46 (1979); 18 U.S.C. § 1953 (lottery tickets) held not limited to organized crime in *United States v. Fabrizio*, 385 U.S. 263, 265-67 (1966); 18 U.S.C. § 2113(b) (bank robbery) held not limited to

Title 18 U.S.C. § 1962(a)-(d) (1982) sets forth standards of "unlawful" conduct, which are enforced through criminal and civil sanctions. Section 1963 of Title 18 sets out the criminal remedies; Section 1964 of Title 18 sets out the civil remedies.[6] Section 1962 states what is "unlawful," not "criminal." As such, RICO is not, as some courts have thought, "primarily a criminal statute."[7] Accordingly, because the civil scope of RICO is *broader* than its criminal scope, Federal RICO is *not* primarily criminal and punitive, but primarily civil and remedial.[8]

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gangsters in *Bell v. United States*, 462 U.S. 356, 358-62 (1983); 18 U.S.C. § 2421 (white slave traffic) held not limited to commercial prostitution in *Caminetti v. United States*, 242 U.S. 470, 485-90 (1917); 18 U.S.C. § 3575 (sentencing) held not limited to organized crime in *United States v. Schell*, 692 F.2d 672, 674 (10th Cir. 1982).

[6] *See Sedima*, 473 U.S. at 489; *Basic Concepts* at 1921, n.71; *Civil Action* at 343, n.20. The criminal remedies include imprisonment, fine, and forfeiture. The civil remedies include divestment, future restrictions, dissolution and reorganization; the private civil remedies include treble damages and attorneys fees.

[7] *See, e.g., In Re Action Industries Tender Offer*, 572 F. Supp. 846, 849 (E.D. Va. 1983). "Person" ("individual" or "entity") defines the class who may be sued civilly for violations of § 1962 under § 1964, but "whoever" ("individual," "corporate body," but *not* "governmental unit") defines the class who may be indicted for violations for § 1962 under § 1963. *See generally, Civil Action* at 243 n.20.

[8] *See Sedima*, 473 U.S. at 497-99; *Turkette*, 452 U.S. at 593 (RICO is "both preventive and remedial"). *See also*, 115 Cong. Rec. 6993 (1969) (statement of Sen. Hruska regarding S. 1623, the immediate predecessor to S. 1861, from which Title IX was partially drawn, "The criminal provisions are intended primarily as an adjunct to the civil provisions, which I consider as the more important feature of the bill."); 116 Cong. Rec. 602 (1970) (statement of Sen. Hruska) ("principal value of . . . legislation . . . in civil provisions"). RICO's civil remedies, based on a showing of the preponderance of the evidence, are available to the government

Congress directed that Federal RICO "be liberally construed to effectuate its remedial purposes." 84 Stat. 941 (1970). *See Sedima*, 473 U.S. at 497-99; *Russello*, 464 U.S. at 27. ("[T]his is the only substantive federal criminal statute that contains such a directive. . .").[9]

This Court, too, has recognized Congress' plain intent. Federal "RICO is to be read broadly," and "is to 'be liberally construed to effectuate its remedial purposes . . .'" *Sedima*, 473 U.S. at 497-98. Federal "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime . . . [and] it is in this spirit that all of the Act's provisions should be read." *Id.*

The background of the Indiana RICO statute is consistent with the understanding of this Court of the background of Federal RICO expressed in *Russello* and *Turkette*. 504 N.E.2d at 564.

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or other litigants. *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974) (government suit), *cert. denied*, 420 U.S. 925 (1975); *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 530-32 (9th Cir. 1987) (private suit). *See Sedima*, 473 U.S. at 491 ("[N]o indication . . . depart from [preponderance]").

[9] The liberal construction clause is not unique in state law. It had its origins in the codification movement of the 19th century. Judicial hostility to change through legislation was common at the time. W. Hurst, The Growth of American Law 186 (1950). Legislatures reacted: "[I]t became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed." D. Wigdor, Roscoe Pound: Philosopher of Law 174 (1974). In fact, a majority of states have abolished the common law rule. The statutes are collected in *Civil Action* at 245 n.25. Judicial hostility continues. *See Sedima*, 473 U.S. at 529 (Powell, J., dissenting) (liberal construction applies only to criminal provisions); *accord, Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1305 (D. Colo. 1984) (Kane, J.). Strict construction is a common law rule; it is not a constitutional mandate. *Tarrant v. Ponte*, 751 F.2d 459, 466 (1st Cir. 1985).

B. Application of RICO: Obscenity

Section 1962(c) of Title 18 embodies certain substantive elements: (1) employment by or association of a defendant with (2) an "enterprise" (3) the affairs of which are conducted by or participated in by the defendant "through a pattern of racketeering activity." *United States v. Griffin*, 660 F.2d 996, 999 (4th Cir. 1981). *Sedima*, 473 U.S. at 496. ("A violation of § 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.") The substantive provisions of Indiana's RICO statute are "essentially patterned" after Federal RICO. 504 N.E.2d at 560.

Section 1961(1) of Title 18 defines "racketeering activity." The definition includes criminal offenses under specified Federal or state laws, which deal with (1) violence, (2) provision of illegal goods and services, (3) corruption in the labor movement or among public officials, and (4) commercial and other forms of criminal fraud. *Civil Action* at 300-06.

In 1970, "obscenity" was not a predicate offense under Federal RICO. "Obscenity" was added in 1984, since its manufacture and distribution had by then become a major organized crime activity. 130 Cong. Rec. 433-57 (daily ed. Jan. 30, 1984) (statement of Sen. Helms) ("third largest source of income for organized crime"). Similarly, twenty states, including Indiana, now incorporate "obscenity" among the predicate offenses of their RICO statutes.[10]

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[10] Ariz. Rev. Stat. Ann. § 13-2301 (1978 & Supp. 1984-85); Cal. Penal Code § 186.2 (West Supp. 1985); Colo. Rev. Stat. § 18-17-103 (Supp. 1984); Conn. Gen. Stat. § 53-394 (West Supp. 1984); Del. Code Ann. tit. 11, § 1502 (1986); Fla. Stat. § 895.02 (West Supp. 1983); Ga. Code Ann. § 16-14-3 (1983); Hawaii Rev. Stat. § 842-1 (1976); Idaho Code § 18-7803; Ind. Code § 35-45-6-1 (Burns Supp. 1982); N.J. Rev. Stat. § 2C (West Supp. 1982): 41-1; N.D. Cent. Code § 12.1-06.1-10 (Supp. 1984); N.Y. Penal Law § 460.10 (1986); N.C. Gen. Stat. § 190.1 (1986); Ohio Rev. Code

C. Sanctions of RICO: Criminal and Civil

Federal and state RICO legislation is enforced through a wide range of criminal and civil sanctions. In particular, the legislation embodies criminal and civil forfeitures. Such forfeitures have long been employed in the law. For example the standards of proof differ since criminal RICO may also result in imprisonment. Yet, their basic constitutionality is also established beyond serious question. They are part of the basic fabric of our law.

The Indiana statute allows either civil or criminal actions, both of which may result in forfeiture. Nothing that Goldsmith did in employing the civil forfeiture provisions departed from long-used and well-recognized law enforcement techniques. "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

Federal RICO embodies criminal forfeiture. Most Federal and state legislation enacted in the post-Civil War period, however, provided for civil forfeiture.[11] Indeed, a number of other state statutes today embody various kinds of civil, not criminal, forfeitures.[12] Both criminal and civil forfeitures have ancient roots.

Ann. § 2907.31 (Page 1985); Or. Rev. Stat. § 155.714 (1981); R. I. Gen. Laws § 7-15-1 (Michie Supp. 1983); Utah Code Ann. § 76-10-1602 (Smith Supp. 1983); Wash. Rev. Code § 9A.82.010 (West Supp. 1985); Wis. Stat. Ann. § 946.82 (West Supp. 1984-85).

[11] For an excellent review of the historical materials, *see generally*, Note, *Bane of American Forfeiture Law*, 62 Cornell L. Rev. 768 (1977) (cited as "Forfeiture").

[12] At the same time, Congress enacted RICO, it enacted the Comprehensive Drug Abuse Prevention and Control Act. 84 Stat. 1236 *codified* at 21 U.S.C. § 801 *et seq.* While RICO included criminal forfeiture provisions, the Drug Act included both criminal and civil forfeiture provisions. 21 U.S.C. § 848 (criminal); 21 U.S.C. § 881 (civil). The civil forfeiture provisions, too, have been upheld against various challenges. *See, e.g., United States v. One 1978 Mercedes Benz Four-Door Sedan*, 711 F.2d 1297, 1300-03 (5th Cir. 1983). Following the 1970 Drug Act, the National Conference of Commissioners on Uniform State Laws also adopted the Uniform Controlled Substances Act. 9 Uniform Law Annotated 187 (Supp. 1983). The Uniform Controlled Substances Act provides for civil forfeitures; the Act contains no criminal forfeiture provision. The civil forfeiture provision is Section 505; it parallels the civil forfeiture provision of the Federal Drug Act. *Id.* at § 505, p. 611-14. Forty-six states have adopted the Uniform Act. *Id.* at 78. A majority of the twenty-seven states that have RICO statutes provide for civil forfeiture of property. The provisions parallel the 1970 Drug Act and the Uniform Act. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-2314 (Supp. 1983); Colo. Rev. Stat. § 18-17-106 (Supp. 1984); Del. Code Ann. Title 11, § 1505(6) (1986); Fla. Rev. Stat. Ann. § 895.05 (West Supp. 1983); Ga. Code Ann. § 26-3401 (1983); Ind. Code Ann. § 34-4-30.5-4 (Burns Supp. 1982); Miss. Code Ann. § 97-43-9-2 (Layers Co-op 1984); Nev. Rev. Stat. § 207.4-17 (1983); N.J. Stat. Ann. § 2C: 41-4 (West Supp. 1982); N.C. Gen. Stat. § 75-D-5 (1986); N.D. Cent. Code § 12.1-06.1-05 (Smith Supp. 1983); Or. Rev. Stat. § 155.725(3) (Smith Supp. 1983); R. I. Gen. Laws § 7-15-3-1 (Michie Supp. 1985); Wis. Stat. Ann. § 946.86 (West Supp. 1983-85).

Biblical,[13] Greek,[14] and Roman [15] law knew of forms of forfeiture. So, too, did English law. The forfeiture of property is one of the earliest sanctions of Anglo-Saxon law. Three types of forfeitures came to be distinguished: statutory forfeiture, forfeiture consequent to a criminal conviction and attainder, and deodand. Statutory forfeitures and forfeitures consequent to a criminal conviction merit discussion.

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[13] *Exodus* 21:28. ("If an ox gore a man or woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.")

[14] *See* O. Holmes, the Common Law at 8 (1881).

[15] 7 Twelve Tables 1, *translated in*, I. Scott, The Civil Law at 69 (1932). ("If a quadruped causes injury to anyone, let the owner tend him the estimated amount of the damage; and if he is unwilling to accept it, the owner snall . . . surrender the animal that caused the injury.")

Statutes in England imposed a variety of forfeitures, principally as a means of tax enforcement. In the mid-seventeenth century, Parliament enacted the Navigation Acts, the broadest of the English forfeiture statutes, which required that shipping had to be in English-built, -owned, and -manned vessels, and they provided that violations would result in the forfeiture of the ship and the goods it carried.[16] Suits for these forfeitures were commenced by civil information. They could be brought against a person (*in personam*) or against the thing to be forfeited (*in rem*). Typically, they were brought *in rem* against the vessel and the goods, as the owner could not be located or was beyond the jurisdiction of the court.[17]

Forfeiture consequent to a criminal conviction and attainder was, however, the oldest and best known. It was imposed on traitors and felons, who forfeited all of their personal and real property, not as a result of their conviction, but of their attainder, a pronouncement of legal death.[18] Attainder also means corruption of blood, that is, no descendant could ever trace a line of inheritance through the attained ancestor. Forfeiture of lands related back to the time of the commission of the offense, voiding subsequent sales or encumbrances. Forfeiture of

[16] L. Harper, The English Navigation Laws: A Seventeenth-Century Experiment in Social Engineering at 109, 387-414 (1964).

[17] *See, e.g.* III W. Blackstone, Commentaries at 262.

[18] *See, e.g.*, IV W. Blackstone, Commentaries at 374-381. "Felony" under early English law included any breach of the feudal engagement. M. Radin, Anglo-American Legal History at 234 (1936). As such, it resulted in the forfeiture of the feudal estate to the lord. *Id.* at 240. Blackstone traces the origins of the word "felony" to the Anglo-Saxon "fee" (estate) and "lon" (price). IV Blackstone, *id.* at 95-96. Chatels went to the king, whose regalian rights included all ownerless property—*bona vacantia*, which is what an outlaw's property was. Radin, *id.* at 240.

goods did not relate back, but transfers collusively made, that is, not *bona fide*, were not good against the crown.[19]

In the American colonies, the extent to which English law and practice should be adopted was a matter of great dispute.[20] Forfeitures did not follow any uniform practice. For example, forfeiture consequent to conviction and attainder was largely abolished in Massachusetts,[21] allowed to fall into disuse in New York,[22] but was fairly widely employed in Pennsylvania[23] and Virginia.[24] The acceptance of deodand presents a cloudier picture, and firm judgments cannot be made on the scope of its adoption.[25] Finally, while the crown did not insist on most forfeitures, since the proceeds would have gone to the colonial governments, it did insist on the enforcement of the Navigation Acts, which by their terms were ap-

[19] Deodands are sometimes spoken of as predecessors of the forfeiture statutes, but the historical evidence indicates that they were atypical. *Compare, Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-683 (1974) *with* Forfeiture at 771-772. An instrument of death replaced the slayer's kin as the object of vengeance. At first the instrument was taken and sold and the proceeds used to buy Masses for the victim. *Calero-Toledo*, 416 U.S. at 681. Throughout the later Middle Ages, the king received the money, which provided a small, but steady source of revenue.

[20] 1 J. Story, Commentaries on the Constitution of the United States at §§ 163-65, 187-197 (Cooley 4th ed. 1873).

[21] V N. Dane, A General Abridgement and Digest of American Law at 4 (1824).

[22] J. Goebel and T. Naughten, Law Enforcement in Colonial New York at 713-713, 716 (1944) (cited as "Goebel"). New York juries simply found nothing to forfeit. *Id.*

[23] *See, e.g., Respublica v. Doan*, 1 U.S. (Dall.) 86, 91 (Pa. 1784) (forfeiture following outlawry).

[24] A. Scott, Criminal Law in Colonial Virginia at 109 (1930).

[25] *Compare* Goebel at 717 *with* S. Pennypacker, Pennsylvania Colonial Cases at 70 (1892).

plicable to the colonies.[26] They were enforced in the vice-admiralty courts, in effect, not *in rem*, but *in personam*, and they were tried by the court without a jury.[27]

Following the Revolution, a variety of statutes continued the practice of declaring specific forfeitures, which could be imposed in criminal or civil proceedings, either *in personam* or *in rem*. How a particular forfeiture was to be treated was a question of legislative intent.[28] So, too, was the time when the forfeiture was to take place, that is, at the time of the offense or at the time of the conviction.[29] The final forfeiture in the Federal courts, however, was patterned after the Navigation Acts, and it was imposed in an *in rem* proceeding. It was also early held that property could be for-

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[26] *See, e.g.*, 12 Car. 2, C. 18 ch II (1660).

[27] *See generally* Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 Am. J. Legal Hist. 250 (1962). After Independence, criminal forfeitures consequent to conviction and attainder fell into disrepute. The Constitution itself forbade bills of attainder—legislative, not judicial, determinations of guilt. U.S. Const. art I, § 9, cl. 3. It also limited corruption of blood and forfeitures of estate for treason to life estates. *Id.* at art III, § 3, cl. 2. In 1790, Congress abolished by statute both corruption of blood and forfeiture of estate as a consequence of Federal criminal prosecutions. 1 Stat. 117, c. 9, § 24 (1790), *codified at* 18 U.S.C. § 3563. *See United States v. Grande*, 620 F.2d 1026, 1039 (4th Cir.) (Criminal forfeiture under RICO constitutional) ("Nothing . . . suggests that either article III or the 1790 statute was intended to prohibit anything other than corruption of blood or forfeiture of estate as imposed at common law."), *cert. denied*, 449 U.S. 919 (1980).

[28] *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 399 (1814).

[29] This Court described as "settled doctrine" in *United States v. Stowell*, 133 U.S. 1, 16-17 (1890) the rule that forfeiture takes place "immediately upon the commission" of the offense and the right to the property then vests in the government, although it was not "perfected" until a judicial decree was issued.

feited without prior criminal conviction[30] and that the time of forfeiture would relate back to the time of the offense, even as against a *bona fide* purchaser for value.[31] *In rem* forfeitures were rationalized by the personification fiction. Personal guilt was not implicated. The prosecution was brought, not against the owner, but the thing itself, and judgment was rendered against the whole world.

The Civil War brought about a major shift in the law of forfeiture. It quickly became evident that traditional treason prosecutions could not be brought against most rebels, for they were safely behind Confederate lines. Their life, liberty, and property—even where their property was not in the South—were beyond the power of northern courts, as *in absentia* prosecutions were not constitutionally possible. The solution hit on by Congress was civil *in rem* forfeiture proceedings.[32] The forfeitures were eventually upheld by this Court.[33] Criminal *in personam* forfeiture proceedings then largely disappeared from the Federal scene.[34] Constitutional attacks on

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[30] *The Palmyra*, 25 U.S. (12 Wheat) 1, 15 (1827). Nevertheless, this Court held in *Coffey v. United States*, 116 U.S. 436, 444-45 (1886) that if there were an acquittal in a criminal proceeding, there could not be a subsequent *in rem* forfeiture in a civil proceeding. *Coffey* was disapproved of by this Court ir *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (neither double jeopardy nor collateral estoppel precludes civil *in rem* forfeiture after criminal acquittal; civil character of proceeding question of legislative intent).

[31] *See supra* nn. 26 and 27. No right to a jury trial exists in an *in rem* forfeiture, even outside of admiralty jurisdiction. *Van Oster v. Kansas*, 272 U.S. 465, 469 (1926).

[32] *See generally* J. Randall, The Confiscation of Property During the Civil War (1913).

[33] *See generally*, III C. Warren, The Supreme Court in United States History at 138-39 (1922) for a treatment of these decisions.

[34] *See, e.g., United States v. Zucker*, 161 U.S. 475, 478 (1896).

civil *in rem* forfeitures were again launched when they were used by the Congress during Prohibition to suppress the traffic in illicit alcohol, but this Court turned them back on the basis of the established precedents of the post-Civil War era.[35] The constitutional validity of the use of *in rem* civil forfeitures in law enforcement today is, therefore, settled beyond serious question.[36] As such, the various civil forfeiture sanctions of Indiana's RICO legislation are neither particularly remarkable nor facially unconstitutional.

II. NEITHER RICO NOR ITS APPLICATION TO OBSCENITY IS UNCONSTITUTIONALLY VAGUE

A careful analysis of the steps taken by Goldsmith in these proceedings shows that his actions were well within clearly established constitutional limits. Petitioner's brief, as well as those of its Amici, however, mischaracterizes the conduct of Goldsmith by ignoring the distinctions between his conduct and that of the other Respondents. In addition, they conflate the distinct issues of vagueness, the status of the pre-trial order as a prior restraint, and import of the contemplated civil forfeiture and other orders on future expressive conduct. An indiscriminate lumping together of each of these issues under the rubric of "prior restraint" facilitates neither analysis nor decision. *See* Jeffries, *Rethinking Prior Restraint*, 92 Yale L. J. 409, 420, 434 (1983) ("The tyranny of labels is such that all things called by the same name are assumed to have the same features. . . . * * * Most regrettable of all is the demonstrated potential of the words 'prior restraint' to confound and deflect rather than to guide and clarify the analysis of important questions of First Amendment policy."); O. Holmes,

[35] *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921).

[36] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-683 (1974).

Collected Legal Papers, 306 (1920) ("To rest upon a formula is a slumber that, prolonged, means death."). When these separate proceedings are independently examined, and when these discrete issues are considered one by one, as they must be, this petition takes on a wholly different light, and Goldsmith's conduct is seen as well within the permissible range of appropriate law enforcement procedures.

Neither RICO nor "obscenity" is unconstitutionally vague. Federal "RICO [legislation] . . . survived various void-for-vagueness challenges." *United States v. Morelli*, 643 F.2d 402, 412 (6th Cir. 1981) (cases collected). Neither "enterprise" nor "pattern," Federal RICO's two essential concepts, is unconstitutionally vague. *Compare United States v. Scotto*, 641 F.2d 47, 52-53 (2d Cir. 1980) (enterprise), *cert. denied*, 452 U.S. 961 (1981) *with United States v. Parness*, 503 F.2d 430, 441 (2d Cir. 1974) (pattern), *cert. denied*, 414 U.S. 1105 (1975). Where the predicate offenses of RICO are not unconstitutionally vague, notice to an offender of proscribed conduct and prosecutive discretion is duly provided. *See United States v. Stofsky* 409 F.Supp. 609, 612 (S.D.N.Y. 1973) (narrow predicate offense makes RICO itself narrow), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

Similar state RICO legislation has passed constitutional muster, including cases in which the predicate offense was "obscenity." *See, e.g., Arizona v. Feld*, 745 P.2d 146, 148-53 (Ariz. App. 1987), *cert. denied*, 108 S.Ct. 1270 (1988); *Cantrell v. State*, 403 So.2d 977, 978 (Fla. 1981); *Bowen v. State*, 402 So.2d 1173, 1174 (Fla. 1981).

Two premises are essential to these decisions. First, RICO legislation is not unconstitutionally vague in itself. Second, "obscenity" is not unconstitutionally vague under this Court's decisions in *Pope v. Illinois* 107 S.Ct. 1918, 1920-21 (1987); *Miller v. California*, 413 U.S. 15, 23

(1973); and *Roth v. United States*, 354 U.S. 476, 485 (1957). Accordingly, RICO legislation is not unconstitutionally vague when it is applied to "obscenity." *See, e.g., Arizona v. Feld*, 745 P.2d at 148-52. *Compare Brockett v. Spokane Arcades*, 472 U.S. 491, 502-07 (1985) and, *Jacobellis v. Ohio*, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting).

This Court has, of course, long recognized that not all uses of language are protected by the First or Fourteenth Amendments. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). "Obscenity" deserves no constitutional protection, since obscene matter plays no part in the free expression of ideas, and it is of such slight social value that any benefit that may be derived from it is outweighed by society's interest in order and morality. *Roth v. United States*, 354 U.S. 476, 484-85 (1957). *Roth* specifically rejected the proposition that obscene materials are protected by the First Amendment; it upheld a prosecution under a Federal statute punishing the mailing of "obscene, lewd, lascivious or filthy" materials. 354 U.S. at 485 ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . .").

The test for "obscenity" was re-examined in *Miller v. California*, 413 U.S. 15 (1973). *Miller* articulated a three part test for "obscenity": 1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest; 2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and 3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Miller*, 413 U.S. at 24.[37] It held that "[s]ex and nudity [could] . . . not

[37] Justice Brennan has urged this Court to abandon the effort to distinguish between protected and unprotected material in the sphere of "consenting adults", since the effort has proved so vexing, time-consuming, and divisive. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 86-91 (1973) (Brennan, J., dissenting) (companion case to *Miller*). Justice Brennan has argued that even after all this effort, "obscenity" stubbornly "remained . . . resistant to the formulation of stable and manageable standards." 413 U.S. at 73 (Brennan, J., dissenting). The *Miller* Court disagreed. Accordingly, just as the Fourteenth Amendment is not now thought to embody Herbert Spencer's *Social Statistics*, it is not yet thought to reflect John Stuart Mill's *On Liberty*. *Compare Faris Adult Theatre I v. Slaton*, 413 U.S. 49, 68-69 (1973) (Burger, C.J.) *with Lochner v. New York*, 198 U.S. 45, 75 (Holmes, J., dissenting).

The exact intent of the Founders embodied in the First Amendment is not clear from the historical evidence. *See generally*, L. Levy, Emergency of Free Press at 320-25 (2d ed. 1985). "Obscenity" prosecutions were, however, a feature of English law prior to the Revolution. *See, e.g., Dominus Rex v. Curl*, 2 Str. 789, 93 Eng. Rep. 849 (1727). Colonies, too, prohibited obscenity by statute as early as 1711. Charter and General Laws, The Colony and Province Laws of Massachusetts Bay at 399 (1814). Reports of "obscenity" prosecutions also exist, at least in the years after the Revolution, when the reporting of decisions had become more common. *See, e.g., Commonwealth v. Sharpless*, 2 Serg. & Rawles 91 (Pa. 1815) (obscenity common law offense); *Commonwealth v. Holmes*, 17 Mass. 336 (1821) (Parker, C.J.); W. Nelson, Americanization of the Common Law at 110 (1975) (discussion of available court records). As early as 1776, the state constitutions, moreover, protected free speech. Constitution of Pennsylvania of 1776, Declaration of Rights, cl 12 ("printing press . . . free . . . no law . . . to restrain"); Constitution of Massachusetts of 1780, Art. XVI ("The right of free speech shall not be abridged"). The common law, too, considered the distribution of "obscenity" a "public nuisance." 1 H. Wood, The Law of Nuisances § 68 at 87 (3rd ed. 1893). The co-existence of the prohibition of "obscenity" and the protection of free speech has, therefore, never been established as inconsistent. *See, e.g., Commonwealth v. Stock*, 346 Pa. Super 60, 67 499 A.2d 308, 315 (1985) (Pa. constitution free speech protections not greater than Federal constitution); *Commonwealth v. United Books, Inc.*, 389 Mass. 888, 898, 453 N.E.2d 406, 416 (1983) (rejection of consenting adults test under Massa-

be exploited without limit by film or pictures exhibited or sold in places of public accommodation, anymore than live sex and nudity can be exhibited or sold without limit in such public places." *Id.* at 25-26.

Recently, this Court reaffirmed *Miller* in upholding a state prosecution for the sale of allegedly obscene materials. *Pope v. Illinois*, 107 S. Ct. 1918 (1987). *Pope* clarified, however, how the *Miller* test was to be applied. *Pope* held that the third prong of *Miller* is to be decided from the perspective of a reasonable person.

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chusetts constitution); *see also, Near v. Minnesota*, 283 U.S. at 717 (Parker, C.J. quoted on scope of Massachusetts constitution and prior restraint).

Modern theorists of free speech offer two basic rationales for its protection. Positively, A. Meikeljohn, Free Speech and Its Relation to Self Government 1-27 (1948) argues that the legitimacy of governmental decisions presupposes full participation by those who will be affected. But since "obscenity" makes no contribution to the process of self-government, it is not "speech." *See* Z. Chafee, Free Speech in the United States 150 (1941), *cited in Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Negatively, the essence of free speech may be said to lie in Holmes' concept of a "marketplace of ideas." Speech, therefore, ought not be suppressed, since it might constitute unrecognized truth. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See also Frohwerk v. United States*, 249 U.S. 204, 206 (1919) (Holmes, J.) ("The First Amendment . . . cannot have been, and obviously was not intended to, give immunity to every possible use of language.") Here, too, "obscenity" is not "speech," since it is devoid of content.

If our society is to abandon this unbroken tradition and adopt a consenting adults test, it ought to come from jury verdicts reflecting changing community standards or legislative action at the local level. Then, such change will be subject to similar corrective community or legal action to vindicate society's long-standing interest in upholding basic human decency and the quality of community life. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine and Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Miller v. California*, 413 U.S. 15, 32 (1973). *See Time*, July 21, 1986 at 22 (3 out of 4 Americans favor more strict enforcement of obscenity statutes). Nothing that has happened since 1973, save change in personnel on this Court, can be thought to have undermined the fundamental soundness of Chief Justice Burger's words in *Miller*. Accordingly, this Court ought not now read into the constitution a consenting adults test.

It cannot be persuasively argued, therefore, that the standards for determining what is "obscene" are vague or that RICO's incorporation of "obscenity" somehow inhibits the exploring of the outer limits of free expression. *See Roth*, 354 U.S. at 491-92 (quoting *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947)):

> That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .

Community standards provide a sufficiently definite basis on which to predicate "obscenity" regulation. The rejection of community standards in the area of consenting adults, moreover, would have troubling consequences. If a line embodying community standards cannot be drawn in the area of consenting adults, a similar line cannot be drawn in the area of unconsenting adults or children. *See Miller v. California*, 413 U.S. 15, 28 (1973). Of necessity, the line will have to reflect community standards in each area. It is only the audience for the material that changes.

At the urging of commercial interests, this Court once read into the Constitution a regime of "freedom," which struck down child labor legislation. *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (textile mills) ("freedom of commerce"); *see generally*, Pound, *Liberty of Contract*, 18 Yale L. J. 454 (1908). At the urging of other commercial interests, it ought not now read into the Constitution a regime of "consenting adults" in the area of sexually explicit material. *See* G. Hegel, Philosophy of History Pt. IV, § 3 ch. 2 at 537 (Dome Library 1902) ("when liberty is mentioned we must always be careful to observe whether it is not really the assertion of private interest which is clearly designated"). No decent society

that cares about the quality of its community life ought to be constitutionally forced into that position. *See Bowers v. Hardwick*, 106 S. Ct. 2841, 2846 (1986) (no constitutional right to engage in sodomy) ("The Court is most vulnerable and comes nearest in illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."); T. Livy, History of Rome (1854) ("Rome was originally, when poor and small, a unique example of austere virtue; then it corrupted, it rotted, it slowly absorbed vices").

Finally, the facts in this litigation amply demonstrate that prosecution is possible—indeed routinely possible—without approaching the hypothetically marginal case where the distinction between "obscenity" and "free speech" may be difficult to draw. This proceeding, in short, hardly constituted a "trap for the innocent [like] the ancient law of Caligula." *United States v. Cardiff*, 344 U.S. 174, 176 (1952). The Gorelick defendants knew full-well that their conduct was inconsistent with the standards of the people of Indiana. As such, the Indiana RICO statute's application to "obscenity" ought to be upheld on its face in these proceedings against First and Fourteenth Amendment objections.

III. A PRETRIAL FREEZE ORDER THAT DOES NOT RESTRICT EXPRESSIVE CONDUCT IS NOT A CONSTITUTIONALLY IMPERMISSIBLE PRIOR RESTRAINT

The Hamilton County Circuit Court's pretrial freeze order did not constitute an impermissible prior restraint of free speech. Under this Court's seminal decision in *Near v. Minnesota*, 203 U.S. 697 (1931) (permanent injunction under nuisance statute against operation of anti-Semitic newspaper impermissible since prior restraint of free press), a prior restraint of a publication is, of course, unconstitutional. Such restraints, moreover, are

to be judged, not by their form, but by their effect. 203 U.S. at 708 (operation and effect of the statute in substance). *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315 n.13 (1980); *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971).

Goldsmith, however, proceeded at each step in this litigation against the Gorelick defendants in full compliance with the relevant constitutional safeguards for a seizure and a trial dealing with expressive materials. No objection can be validly lodged against the manner in which the detectives obtained their exhibits, since this Court's decision in *Maryland v. Macon*, 472 U.S. 463 (1985) expressly approved the undercover purchase of "obscenity". Even had the pre-trial order specifically restrained expressive conduct, an adversarial hearing prior to the order would not have been required, since a prompt judicial determination on the merits is all that is necessary, and one was set here for 72 hours after entry of the order. *See Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 558-62 (1975) (brief period with prompt hearing); *Heller v. New York*, 413 U.S. 403, 489-90 (1973) (permissible to have prompt hearing after initial seizure). Any delay in the hearing on the merits that occurred was wholly attributable to conduct on the part of the defendants; such delays are, of course, excludable from calculations of promptness. *Heller*, 413 U.S. at 490. A pre-trial order may, moreover, be obtained, as here, on a showing of probable cause. *Cf. New York v. P.J. Video*, 475 U.S. 868 (1986). The nature of the book stores may also be considered in determining the "obscenity" of the materials distributed. Here, the sexually explicit materials were sold in a store that featured live sex acts. (R. 17-18). It is well-established that the context of distribution may also be considered in determining "obscenity." *Splawn v. California*, 431 U.S. 595, 598-99 (1977); *Hamling v. United States*, 418 U.S. 87, 130 (1974). "Obscenity" may not, of course, be made a strict liability offense. *Smith v. California*, 362 U.S. 147

(1959). But, here, the individuals, who sold the material and ran the stores, were obviously knowledgeable about the character of the material that they were distributing to the public. (R. 118).

Indeed, expressive conduct was not even restricted by the pre-trial order that was obtained. The Court did not grant an order that restricted the Gorelick defendants' operation of their businesses. They were merely ordered not to dissipate their assets—other than in the normal course of business—prior to a final judgment.[38] The order entered relative to the unopened store was specifically qualified: "until further order of . . . [the] court." (A. 3). It was, in effect, little more than "another form of civil attachment." 479 N.E.2d 578, 607 (Conover, J., dissenting). Nothing in the record indicates that had the Gorelick defendants sought to use the expressive assets frozen that they would have been prevented from doing so. Nor does anything in the record indicate that the Court would not have allowed the defendants to open the unopened store or to have used the expressive materials in the store in the operation of their two other stores. In fact, the Court expressly permitted them to continue to operate the other two stores in the normal course of their business. (A. 3). As such, it was hardly unreasonable merely to freeze the *status quo*. *See Arizona v. Feld*, 745 P.2d 146, 154 (Az. App. 1987) ("the court . . . [may] restrain a defendant from moving inventory in its entirety"), *cert. denied*, 108 S. Ct. 270 (1988).

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[38] Recently, the Second Circuit upheld the granting of similar, but more far-reaching relief to the government under 18 U.S.C. § 1964: the imposition of a receivership. *See United States v. Ianniello*, 646 F. Supp. 1289, 1299-1300 (S.D.N.Y. 1986), *aff'd* 824 F.2d 203, 207-09 (2nd Cir. 1987). In *Ianniello*, the defendants *continued* to skim profits from a restaurant that was subject to a forfeiture order. 824 F.2d at 208 ("The District Court has considerable discretion to frame the scope of a receivership to meet the needs of the case").

This Court, moreover, has long recognized the general propriety of pre-trial orders that merely preserve the *status quo*. In *United States v. First Nat'l City Bank*, 379 U.S. 378, 385 (1965), this Court, for example, upheld a prejudgment sequestration. There, the government sought to enjoin a bank from transferring the property of the taxpayer, a Uruguayan corporation, to protect its jeopardy income tax assessment. The Court relied on *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). In *Deckert*, several purchasers had brought a suit in equity to rescind the fraudulent sale of securities and to obtain restitution. The monies necessary to satisfy the purchaser's claim were in the hands of a third-party trustee, named as a defendant, but not as violator. Noting that the violators' assets were "in danger of dissipation or depletion," 311 U.S. at 290, the Court upheld the asset freeze, observing that "the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case." *Id.* at 39. The issuance of the injunction was, therefore, a matter of "sound discretion" to be upheld on appeal absent "improvident exercise of judicial discretion." *Id.* at 290 (citations omitted). *See also, F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603-05 (1966) (preliminary injunction issued to prevent merger).

Traditionally, temporary restraining orders or preliminary injunctions have also been granted and upheld by circuit courts of appeals in a variety of situations, where their goal was to preserve the *status quo* pending the outcome of litigation. For example, in *Productos Carnic, S.A. v. Central Am. Beef & Seafood Trading Co.*, 621 F.2d 683, 687 (5th Cir. 1980), the Fifth Circuit upheld an order requiring that the proceeds of a sale be preserved in an interest-bearing account pending the final result of the litigation. The Court found that, without such an injunction, a substantial risk existed that a "meaningful decision on the merits would be impossible"

because defendants, by disposing of the assets, could make "any judgment ultimately obtained against [them] . . . unenforceable." *Id.* at 686. The Court held that the possibility of such an "ineffective remedy" outweighed the alleged damages that such an injunction might cause the defendants. *Id.* at 687. Similarly, in *International Control Corp. v. Vesco*, 490 F.2d 1334 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974), the Second Circuit upheld an order preventing the dissipation or impairment of assets, which included a Boeing 707, ICC stocks, and a yacht. The Court concluded that while "an extraordinary remedy, a preliminary injunction is properly granted to preserve the status quo *pendente lite* . . . ." *Id.* at 1347.[39] Ac-

[39] *See also In Re Feit & Drexler, Inc.*, 760 F.2d 406 (2nd Cir. 1985) (bankruptcy trustee obtained interlocutory order refraining transfer of assets); *Mishkin v. Kenney & Branisel, Inc.*, 609 F. Supp. 1254, 1257 (S.D.N.Y.) (preliminary injunctive relief granted to prevent disposing of assets), *aff'd without opinion*, 779 F.2d 35 (2nd Cir. 1985).

These decisions, of course, reflect standard equity practice, which is subject to traditional English equity limitations. Nothing in the Constitution, however, tells Indiana that it may not authorize similar orders without toeing the line of such limitations. English law, too, is moving away from the older view. Historically, injunctions against persons to restrain the removal of assets were not permitted in English law under *Lister & Co. v. Stubbs* [1890] 45 Ch. D. I. The relevant materials are reviewed in *Rasu Maritime v. Pertambanga*, [1977] 3 A11.E.R. 324, 311 (Denning, J.). *Mareva v. International Bulkcarriers*, [1975] 2 Lloyds Rep. 509, marked a dramatic turn, for it upheld the issuance of injunctions to freeze assets. A new test was formulated in *Third Chandris Shipping v. Unimarine, S.A.*, [1979] 2 A11.E.R. 972, 984-85 (Denning, J.). While at first the new test seemed to be applicable only to international litigation, in *Barclay-Johnson v. Yuill*, [1909] 3 A11.E.R. 190, 194, it was made to rest solely on the "risk of removal of assets." The present state of English law, in which such injunctions are fairly easily obtained, is reflected in *Bayer A.G. v. Winter*, [1986] 1 A11.E.R. 733, 737. *See generally*, L. Denning, The Due Process of Law at 135-51 (1980) (discussion of *Mareva* injunctions); Profits of Crime and Their Recovery: Report of Howard League for Penal Reform 104-111 (1984) (discussion of *Mareva* injunctions). For a powerful critique of the traditional limitations from a historical, comparative and functional perspective that calls for reform, *see* Hammond, *Interlocutory Injunctions: Time For a New Model*, U. Toronto L.J. 240 (1980).

cordingly, no sound objection may be raised to the carefully crafted Hamilton County Circuit Court's pretrial freeze order.

IV. A CIVIL FORFEITURE SANCTION THAT APPLIES TO ASSETS ACQUIRED OR MAINTAINED BY UNLAWFUL CONDUCT IS NOT A CONSTITUTIONALLY IMPERMISSIBLE PRIOR RESTRAINT

Once it is seen that the incorporation of "obscenity" into Indiana RICO does not make the statute vague, the civil sanctions authorized by the statute may be properly

Freeze orders are particularly appropriate in RICO litigation, where the danger of dissipation of assets is ever present. *Forfeiture of Narcotics Proceeds* Hearings Before the Senate Subcomm. on Criminal Justice, Comm. on the Judiciary, 96th Cong., 2d Sess. 96-97, 114 (1980) (Deputy Assistant Attorney General, U.S. Department of Justice) (three problems: 1) ascertaining what the assets are, 2) reaching them if they are in the hands of third parties, and 3) preventing their dissipation before trial; problems compounded since "sophisticated criminals . . . have access to the best lawyers and accountants money can buy"); *Stronger Federal Effort Needed in Fight Against Organized Crime: Report by Comptroller General of the United States* 31-34 (1981) (problems in criminal forfeiture: 1) uncertain status of assets, 2) third party holdings, and 3) dissipation prior to seizure); *Asset Forfeiture—A Seldom Used Tool in Combatting Drug Trafficking, Report of Comptroller General of the United States* 30-42 (1981) (same). In fact, the need to protect assets subject to seizure is amply demonstrated by what occurred in this litigation after the issuance of the freeze order; Burton Gorelick was indicted and pled guilty to Federal RICO charges in an arson-insurance fraud scam that occurred while these proceedings were pending; he burned down World Video System; his interests in World Video System and the 4447 Corporation were then criminally forfeited to the United States. *See*, Order of June 5, 1987, *United States v. Burton H. Gorelick*, No. IP 86-29-CR-01 (United States District Court for the Southern District of Indiana).

evaluated under the relevant constitutional standards. "Obscenity" is not speech. After a proper judicial determination is made that expressive materials are "obscenity," any sanction imposed on the offender is not imposed on "speech". Labeling those sanctions as prior restraints mischaracterizes the issue. Indeed, after these proceedings, the Gorelick defendants would have been under "no restraint at all on the dissemination of particular materials since . . . [they would be] free to carry on . . . [their] book selling business" elsewhere using their other assets and the expressive materials not forfeited. *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172, 3177 n.2 (1986). In contrast, the indirect impact of these sanctions must be examined, not as prior restraints, but under this court's jurisprudence following *United States v. O'Brien*, 391 U.S. 367 (1968). They should stand on no different footing than any other generally applicable governmental regulation or sanction. *See Arcara v. Cloud Books Inc.*, 106 S. Ct. 3172, 3175-76 (1986) (*O'Brien* controls statute that has "incidental effect of burdening" expressive conduct). Under *O'Brien*, the proposed civil sanctions are not unconstitutional on their face.

The imposition of the civil forfeiture sanction under the Indiana RICO statute in an "obscenity" case would not constitute an impermissible prior restraint of free speech. First, it is well-established that civil proceedings may be constitutionally employed in an effort to control "obscenity." *See, e.g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55 (1973) (injunction); *Kingsley Books Inc. v. Brown*, 354 U.S. 436, 441-44 (1957) (injunction). The heightened protections because of the possibility of jail in the criminal process are, in short, not constitutionally compelled in "obscenity" litigation. *See, e.g., Cooper v. Mitchell Brother's Santa Ana Theatre*, 454 U.S. 90 (1981) (reasonable doubt standard not required); *Alexander v. Virginia*, 413 U.S. 836 (1973) (jury trial not required).

Second, the limited forfeiture sanctions at issue here were to be employed only "after a full adversary proceeding and a final judicial determination . . ." *Paris*, 413 U.S. at 55. The assets to be forfeited were limited to those required or maintained in violation of the law. As such, the effect of the various civil forfeitures would have been indistinguishable from the effect of a criminal fine, which is, of course, beyond question constitutional. *See Arcara v. Cloud Books, Inc.*, 106 S.Ct. 3172, 3177 (1986) (closure order not unconstitutional) ("every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities."); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 320, 324 (1980) (White J. and Rehnquist, J., dissenting); *Polykoff v. Collins*, 596 F. Supp. 584, (D. Ariz. 1984) (fine for "obscenity" not prior restraint), *aff'd*, 816 F.2d 1326 (9th Cir. 1987).[40]

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[40] This Court observed in *Arcara*:

> [R]espondents [whose bookstore was closed under a statute regulating prostitution] argue that the effect of the statutory closure remedy impermissibly burdens its First Amendment protected book selling activities. The severity of this burden is dubious at best, and is mitigated by the fact that respondents remain free to sell the same material at another location. In any event, this argument proves too much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim. Similarly, a thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed because of the confinement, but we have explicitly rejected a prisoner's claim to a prison environment least restrictive of his desire to speak to outsiders. . . .
>
> It is true that the closure order in this case would require respondents to move their book selling business to another location. Yet we have not traditionally subjected every criminal and civil sanction imposed through legal process to "least

Third, the civil forfeiture sanction envisioned would not be otherwise objectionable, since it is consistent with the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968). Under *O'Brien*, such sanctions must fall within the constitutional power of a state; the regulation must further an important or substantial government interest; the governmental interest must be unrelated to the suppression of free expression; and the incidental restriction on free speech of the sanction must be no greater than necessary to further the governmental interest. *Id.* at 377.

No serious question can be raised about the first three points. *See Young v. American Mini Theatre Inc.*, 427 U.S. 81, 79-83 (1976) (Powell, J. concurring). States have, of course, power to control "obscenity", and its control furthers an important or substantial government interest. *See, e.g., Miller v. California*, 413 U.S. 18, 19 (1973). The interest in imposing the civil sanction for the unlawful distribution is, moreover, unrelated to constitutionally protected speech, since "obscenity" is not protected speech. *Id.* at 20. The issue turns, therefore, on assessing the incidental restriction of the sanction on future expressive conduct.

This Court in *United States v. Albertini*, 472 U.S. 675, 688-89 (1985), which involved an exclusion order issued on a military base, observed:

> restrictive means" scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O'Brien*, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity . . . (citations omitted)

106 S. Ct. at 3177-78. Since the predicate offense here involved the sale of expressive material, it, of course, raises the *O'Brien* issue in an expressive context. *See id.* at 3178 (O'Connor, J., concurring) Nevertheless, the *O'Brien* test is fully met.

> Regulations that burden speech incidentally or control the time, place and manner of expression must be evaluated in terms of their general effect. [S]uch regulations [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech. Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. The validity of such regulations does not turn on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests. In *Community for Creative Non-Violence*, we observed that *O'Brien* does not assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained. We are even less disposed to conclude that *O'Brien* assigns to the judiciary the authority to manage military facilities throughout the Nation (citations omitted).[41]

Obviously, controlling "obscenity" would be less effective if its purveyors could retain the assets acquired or maintained through their violations of the law. Recog-

[41] *Albertini* may not be distinguished on the grounds that it involved a military base in light of *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). In *Clark*, demonstrators were prohibited from camping in certain public park areas as "expressive conduct" to draw attention to homelessness. While the court dealt with the regulation as a time, place and manner restriction, it recognized the relevance of an *O'Brien*-type analysis. 468 U.S. at 294 (*O'Brien* cited and relied upon); 298-300 (*O'Brien* is "little . . . different" and regulation "sustainable" under *O'Brien* test). It then upheld the regulations even though they impacted on expressive conduct in a public park. *Also see Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). And a similar result, pre-*O'Brien*, was reached in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

nizing this, the Indiana legislature has duly determined that the civil forfeiture of these assets is the most appropriate method for curtailing patterns of violations of its valid "obscenity" regulations. The purpose of the statute's forfeiture sanctions are, as the Indiana Supreme Court noted, "not to restrain the future distribution of presumptively protected speech but rather to disgorge assets" related to the racketeering activity. 504 N.E.2d at 565.[42] *But see Arizona v. Feld*, 745 P.2d 146, 155 (Ariz. App. 1987) (not seize bookshelves, etc.), *cert. denied*, 108 S. Ct. 1270 (1988). Under *Community for Creative Non-Violence* and *Albertini*, this Court ought not second-guess the judgment of the Indiana legislature. *See also*, *Calder v. Jones*, 465 U.S. 783, 790 (1984) ("potential chill on protected First Amendment activity . . . taken into account in the constitutional limitations on the substantive law"); *Near*, 283 U.S. at 716 ("the primary requirements of decency may be enforced against obscene publications"). As such, the civil forfeiture provisions of the Indiana statute ought not be condemned on their face under the First or Fourteenth Amendments.

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[42] Conceivably, a civil forfeiture sanction employed in the context of an "obscenity" offense might, in limited instances, be disproportionate to the underlying unlawful conduct. A similar criminal forfeiture would, of course, be subject to Eighth Amendment limitations. *Compare*, *United States v. Grande*, 620 F.2d 1026, 1037-39 (4th Cir. 1980) (RICO criminal forfeiture not facially in violation of the Fifth or Eighth Amendments), *cert. denied*, 449 U.S. 919 (1980) *with United States v. Busher*, 817 F.2d 1409, 1413-16 (9th Cir. 1987) (RICO criminal forfeitures may, in particular applications, violate the Eighth Amendment). A comparable analysis might well be appropriately applied in a civil proceeding that involved First Amendment interests. Its contours need not be explored here, however, since this appeal challenges the Indiana statute on its face. The facts of the appeal, moreover, indicate that the enterprise, whose assets would be subject to forfeiture, was solely in the business of the distribution of sexually explicit material similar to that which was made the subject of this litigation. What general due process-based proportionality limitations, if any, might be applicable to civil forfeiture sanctions under the First and Fourteenth Amendment may be left to another day—and a more fully developed argument and record.

V. A CIVIL DIVESTITURE, REVOCATION OF LICENSE AND FORFEITURE OF CORPORATE CHARTER ORDER BASED ON UNLAWFUL CONDUCT THAT DOES NOT RESTRICT FUTURE EXPRESSIVE CONDUCT IS NOT A CONSTITUTIONALLY IMPERMISSIBLE PRIOR RESTRAINT

Here, too, any evaluation on their face of the civil sanctions of divestiture, license suspension or revocation, and forfeiture of corporate charter authorized by Indiana RICO must proceed under the *O'Brien* test. These sanctions do not, in short, constitute prior restraints, since the defendants would be free to engage in expressive conduct in the future at other times and places. *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172, 3177 n.2 (1986); *Young v. American Mini Theatres*, 427 U.S. 50, 62-63 (1976).

First, the sanction of divestiture is, of course, well-recognized. *See, e.g., United States v. DuPont & Co.*, 366 U.S. 316, 326-27 (1961) ("Divestiture is itself an equitable remedy designed to protect the public interest.") The proceeds realized from the divestiture remain with the defendants. Control of the assets divested merely passes to others. The defendants themselves would, therefore, be free to employ the proceeds in the future to engage in expressive conduct at any other time or place of their choosing.

Second, license suspension or revocation and forfeiture of corporate charters are also little more than a specialized form of occupational regulation. As early as 1898, the Court upheld a statute prohibiting a convicted felon from practicing medicine. *Hawker v. New York*, 170 U.S. 189, 194 (1898) ("character is as important a qualification as knowledge"). The only due process limitation is one of relatedness. *See, e.g., Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (past conduct unrelated to present fitness may not serve as present disqualification). Convicted felons may, for example, be barred from working on the water-front. *DeVeau v.*

Braisted, 363 U.S. 144 (1960); cf. *Brown v. Hotel & Restaurant Employees & Bartenders Union Local 54*, 468 U.S. 491 (1984) (regulation of union officials in casino industry). Civil disabilities are, moreover, evaluated against civil, not criminal, standards of due process. *Compare, Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) *with Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). As such, bookmakers may, for example, be excluded from race tracks. *See, e.g., Flores v. Los Angeles Turf Club*, 55 Cal.2d 736, 744, 361 P.2d 921, 925-26, 12 Cal. Rptr. 201, 205-06 (1961); *Mones v. Austen*, 318 F. Supp. 653 (S.D. Fla. 1970) Jockeys and trainers, too, may be excluded if they engage in misconduct. *Compare, State Racing Com'n v. McNanus*, 82 N.M. 108, 476 P.2d 767 (1970) (jockey) *with Hubel v. West Virginia Racing Ass'n.*, 513 F.2d 240 (4th Cir. 1975) (trainer).

The civil disabilities envisioned by Indiana RICO, however, are more limited than these types of regulations. If a state may bar a felon from practicing medicine, prevent a convict from working on the docks, or control access to race tracks by jockeys or trainers, it ought to be able to employ these *limited* sanctions in an effort to control "obscenity." Indeed, the defendants here are better off than a doctor, longshoreman, jockey or trainer who is prevented from working in their chosen field of endeavor. They are free to engage in expressive conduct, including selling books, in the future at other times and places. They merely have to divest *these* assets, have suspended or revoked *this* license, or forfeit *this* charter. They are free, of course, to use the proceeds of the divestiture to obtain another license or charter or to continue to engage in the same sort of conduct at other times and in other places. The sanctions merely serve to help assure that they will not again violate the law.[43] Here,

[43] Petitioner's claim that RICO is unconstitutional because of the incidental impact on speech would essentially require this Court to set aside the guilty plea in the related criminal RICO case which without involving obscenity at all resulted in a similar remedy. *See supra* note 39.

too, under *Albertini* and *Community for Creative Non-Violence*, the impact incidentally placed on expressive conduct in the future ought not be held impermissible. As such, these civil sanctions under Indiana's RICO also ought not be condemned on their face under the First or Fourteenth Amendments.

CONCLUSION

RICO legislation is a vital tool in the effort to curtail the infiltration of crime whether organized or not into legitimate business. Subject to appropriate constitutional restraints, the use of RICO in the "obscenity" area is a matter of legislative choice. Neither a properly circumscribed pretrial freeze order nor a properly circumscribed civil forfeiture and similar sanctions are constitutionally impermissible prior restraints on free speech. Accordingly, the judgment of the Indiana Supreme Court, insofar as it facially upholds Indiana's RICO statute and the conduct of Respondent Stephen Goldsmith under it, ought to be affirmed.

Respectfully submitted,

STEPHEN GOLDSMITH
Prosecuting Attorney
Marion County, Indiana
Indianapolis, Indiana 46204

July, 1988.

APPENDICES

APPENDIX A

STATUTES INVOLVED

CHAPTER 6. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

35-45-6-1 Definitions

Sec. 1. As used in this chapter:

"Documentary material" means any document, drawing, photograph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) union, association, or group, whether a legal entity or merely associated in fact.

"Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity.

"Racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation, of a provision of IC 23-2-1, or of a rule or order issued under IC 23-2-1; a violation of IC 35-47; a violation of IC 35-49-3; murder (IC 35-42-1-1); battery as a Class C felony (IC 35-42-2-1); kidnapping (IC 35-42-3-2); child exploitation (IC 35-

42-4-4); robbery (IC 35-42-5-1); arson (IC 35-43-1-1); burglary (IC 35-43-2-1); theft (IC 35-43-4-2); receiving stolen property (IC 35-43-4-2); forgery (IC 35-43-5-2); fraud (IC 35-43-5-4); bribery (IC 35-44-1-1); official misconduct (IC 35-44-1-2); conflict of interest (IC 35-44-1-3); perjury (IC 35-44-2-1); tampering (IC 35-44-3-4); intimidation (IC 35-45-2-1); promoting prostitution (IC 35-45-4-4); promoting professional gambling (IC 35-45-5-4); dealing in cocaine or a narcotic drug (IC 35-48-4-1); dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2); dealing in a schedule IV controlled substance (IC 35-48-4-3); dealing in a schedule V controlled substance (IC 35-48-4-4); or dealing in marijuana, hash oil, or hashish (IC 35-48-4-10). *As added by Acts 1980, P.L. 199, SEC 2. Amended by P.L. 190-1984, SEC. 1.*

35-45-6-2 Corrupt business influence

Sec. 2. (a) A person:

(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

commits corrupt business influence, a Class C felony. *As added by Acts 1980, P.L. 199, SEC. 2.*

CHAPTER 30.5. CIVIL REMEDIES FOR RACKETEERING ACTIVITY

34-4-30.5-1 Definitions

Sec. 1. As used in this chapter:

"Aggrieved person" means a person who has an interest in real property or in an enterprise that:

(1) is the object of corrupt business influence (IC 35-45-6-2); or

(2) has suffered damages or harm as a result of corrupt business influence (IC 35-45-6-2).

"Enterprise" means the same as the definition of that term found in IC 35-45-6-1. *As added by Acts 1980, P.L.199, SEC.1. Amended by P.L.308-1985, SEC.1.*

34-4-30.5-2 Injunctive relief from corrupt business influence; action by prosecuting attorney

Sec. 2. The prosecuting attorney in a county in which the violation occurs, may bring an action to enjoin a violation of IC 35-45-6-2. An action under this section may be brought in any circuit or superior court in a county in which the violation occurs. If the court finds by a preponderance of the evidence that a violation of IC 35-45-6-2 has occurred, it may:

(1) order a defendant to divest himself of any interest in any enterprise or real property;

(2) impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) order the dissolution or reorganization of any enterprise;

(4) order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(5) order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) make any other order or judgment that the court considers appropriate.

In any order or judgment made by the court under this section, the judge shall make due provision for the rights of innocent persons. *As added by Acts 1980, P.L. 199, SEC. 1.*

34-4-30.5-3 Action for forfeiture of property incident to corrupt business influence; orders for forfeiture and seizure

Sec. 3. (a) The prosecuting attorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2,

the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred. *As added by Acts 1980, P.L.199, SEC.1.*

34-4-30.5-4 Seizure of property subject to forfeiture; requisites; custody; limitation of actions

Sec. 4. (a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. Seizure may be made without court order only if:

(1) the seizure is incident to a lawful arrest or search, or to an inspection under an administrative inspection warrant; or

(2) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter.

(b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:

(1) place the property under seal;

(2) remove the property to a place designated by the court; or

(3) require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(c) Property seized under subsection (a) is not subject to replevin, but is considered to be in the custody of the law enforcement officer making the seizure, subject only to order of the court. However, if a seizure of property is made in accordance with subsection (a), the prosecuting attorney shall promptly bring an action for forfeiture under section 3 of this chapter. If an action is not filed within 180 days after the date of the seizure, the law enforcement agency whose officer made the seizure shall return the property to its owner. *As added by Acts 1980, P.L. 199, SEC. 1.*

34-4-30.5-5 Injunctive relief and damages from corrupt business influence; actions by aggrieved persons; jury trial; right to forfeited property; state as aggrieved person

Sec. 5. (a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable damage to the aggrieved person is not required. The court may order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

(b) An aggrieved person may bring an action against a person who has violated IC 35-45-6-2 in a circuit or

superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located, for damages suffered as a result of corrupt business influence. Upon a showing by a preponderance of the evidence that the aggrieved person has been damaged by corrupt business influence, the court shall order the person causing the damage through a violation of IC 35-45-6-2 to pay to the aggrieved person:

(1) An amount equal to three (3) times his actual damages;

(2) The costs of the action;

(3) A reasonable attorney's fee; and

(4) Any punitive damages awarded by the court and allowable under law.

(c) The defendant and the aggrieved person are entitled to a trial by jury in an action brought under this section.

(d) An aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state has in the same property or proceeds.

(e) If the state is an aggrieved person, the attorney general has concurrent jurisdiction with the prosecuting attorney to bring an action under this section. [IC 34-4-30.5-5, as added by Acts 1980, P.L. 199, § 1; P.L. 308-1985, § 2.]

34-4-30.5-6 Collateral estoppel; criminal proceeding

Sec. 6. In any action brought under this chapter, the principle of collateral estoppel operates to bar relitigation of the issues previously determined in a criminal proceeding under IC 35-45-6-2. *As added by Acts 1980, P.L. 199, SEC. 1.*

ARTICLE 49
OBSCENITY AND PORNOGRAPHY

Ch. 1. Definitions.

Ch. 2. General Provisions.

Ch. 3. Crimes.

Chapter 1. Definitions.

35-49-1-1. Definitions applicable throughout article.

Sec. 1. The definitions in this chapter apply throughout this article.

35-49-1-2. "Distribute".

"Distribute" means to transfer possession for a consideration.

35-49-1-3. "Matter".

"Matter" means:

(1) Any book, magazine, newspaper, or other printed or written material;

(2) Any picture, drawing, photograph, motion picture, or other pictorial representation;

(3) Any statue or other figure;

(4) Any recording, transcription, or mechanical, chemical, or electrical reproduction; or

(5) Any other articles, equipment, machines, or materials.

35-49-1-4. "Minor".

"Minor" means any individual under the age of eighteen [18] years.

35-49-1-5. "Nudity".

"Nudity" means:

(1) The showing of the human male or female genitals, pubic area, or buttocks with less than a full opaque covering;

(2) The showing of the female breast with less than a fully opaque covering of any part of the nipple; or

(3) The depiction of covered male genitals in a discernibly turgid state.

35-49-1-6. "Owner".

"Owner" means any person who owns or has legal right to possession of any matter.

35-49-1-7. "Performance".

"Performance" means any play, motion picture, dance, or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one (1) or more persons.

35-49-1-8. "Sado-masochistic abuse".

"Sado-masochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

35-49-1-9. "Sexual conduct".

"Sexual conduct" means:

(1) Sexual intercourse or deviate sexual conduct;

(2) Exhibition of the uncovered genitals in the context of masturbation or other sexual activity;

(3) Exhibition of the uncovered genitals of a person under sixteen [16] years of age;

(4) Sado-masochistic abuse; or

(5) Sexual intercourse or deviate sexual conduct with an animal.

35-49-1-10. "Sexual excitement".

"Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

Chapter 2. General Provisions.

35-49-2-1. Obscene matter or performance.

A matter or performance is obscene for purposes of this article if:

(1) The average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;

(2) The matter of performance depicts or describes, in a patently offensive way, sexual conduct; and

(3) The matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

35-49-2-2. Matter of performance harmful to minors.

A matter or performance is harmful to minors for purposes of this article if:

(1) It describes or represents, in any form, nudity, sexual conduct, sexual excitement, or sado-masochistic abuse;

(2) Considered as a whole, it appeals to the prurient interest of sex of minors;

(3) It is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and

(4) Considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors.

35-49-2-3. Arrest; search; seizure of matter; motion pictures.

(a) Whenever a person:

(1) Offers matter for distribution to the public as stock-in-trade of a lawful business or activity; or

(2) Exhibits matter at a commercial theater showing regularly scheduled performances to the general public; the person may be arrested under this article only if the arresting officer has first obtained an arrest warrant, and matter may be seized as evidence only if a search warrant has first been obtained.

(b) The quantity of matter seized may encompass no more than is reasonable and necessary for the purpose of obtaining evidence.

(c) If:

(1) The subject of a seizure under this chapter is a motion picture that is allegedly harmful to minors; and

(2) The defendant or owner of the motion picture proves that other copies of the motion picture are not available for exhibition;

the court shall order that the defendant or owner may, at his own expense, copy the motion picture and continue showing the motion picture to adults pending a preliminary determination under section 4(b) of this chapter.

35-49-2-4. Adversary hearing; application for; preliminary determination.

(a) Within ten [10] days after:

(1) Matter is obtained by seizure or by purchase under this article; or

(2) The defendant is arrested under this article;

whichever is later, and before trial, the state, the defendant, an owner, or any other party in interest of any

matter seized or purchased may apply for and obtain a prompt adversary hearing for the purpose described in subsection (b).

(b) At the adversary hearing, the court shall make a preliminary determination of whether the matter is:

(1) probably obscene; or

(2) probably harmful to minors.

35-49-2-5. Application of article.

This article does not limit the power of political subdivisions to adopt or enforce zoning ordinances regulating the use of real property.

Chapter 3. Crimes.

35-49-3-1. Sale or distribution or exhibition of obscene matter.

A person who knowingly or intentionally:

(1) Sends or brings into Indiana obscene matter for sale or distribution; or

(2) Offers to distribute, distributes, or exhibits to another person obscene matter;

commits a class A misdemeanor. However, the offense is a class D felony if the obscene matter depicts or describes sexual conduct involving any person who is or appears to be under sixteen (16) years of age.

35-49-3-2. Obscene performance.

A person who knowingly or intentionally engages in, participates in, manages, produces, sponsors, presents, exhibits, photographs, films, or videotapes any obscene performance commits a class A misdemeanor. However, the offense is a class D felony if the obscene performance depicts or describes sexual conduct involving any person who is or appears to be under sixteen (16) years of age.

35-49-3-3. Dissemination of matter or conducting performance harmful to minors.

A person who knowingly or intentionally:

(1) Disseminates matter to minors that is harmful to minors;

(2) Displays matter that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

(3) Sells or displays for sale to any person matter that is harmful to minors within five hundred (500) feet of the nearest property line of a school or church;

(4) Engages in or conducts a performance before minors that is harmful to minors;

(5) Engages in or conducts a performance that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

(6) Misrepresents his age for the purpose of obtaining admission to an area from which minors are restricted because of the display of matter or a performance that is harmful to minors; or

(7) Misrepresents that he is a parent or guardian of a minor for the purpose of obtaining admission of the minor to an area where minors are being restricted because of display of matter or performance that is harmful to minors;

commits a class A misdemeanor.

35-49-3-4. Defense to prosecution for dissemination of matter or conducting performance harmful to minors.

It is a defense to a prosecution under section 3 [35-49-3-3]of this chapter for the defendant to show:

(1) That the matter was disseminated or that the performance was performed for legitimate scientific or educational purposes;

(2) That the matter was disseminated or displayed to or that the performance was performed before the recipient by a bona fide school, museum, or public library that qualifies for certain property tax exemptions under IC 6-1.1-10, or by an employee of such a school, museum, or public library acting within the scope of his employment;

(3) That he had reasonable cause to believe that the minor involved was eighteen [18] years old or older and that the minor exhibited to the defendant a draft card, driver's license, birth certificate, or other official or apparently official document purporting to establish that the minor was eighteen [18] years old or older; or

(4) That he was a salesclerk, motion picture projectionist, usher, or ticket taker, acting within the scope of his employment and that he had no financial interest in the place where he was so employed.

APPENDIX B

STATE OF INDIANA)
) ss:
COUNTY OF MARION)

IN THE CIRCUIT COURT OF MARION COUNTY

Cause No. C83 1788

STEPHEN GOLDSMITH, PROSECUTING ATTORNEY FOR NINETEENTH JUDICIAL CIRCUIT,
Plaintiff

vs.

4447 CORPORATION, WORLD VIDEO SYSTEMS, INC., ISSI THEATRE INC., BURTON GORELICK d/b/a ADULT TOY AND GIFT, DISK DEVELOPMENT, BURKE MENDENHALL, IVAN CHALFIE, HENRY KAHN, BARBARA BYRNES, HERBERT ALLEN, JAMES LEWELLYN, ROGER SUMMERS, EUGENE YARMY, GEORGIA MYERS, HERB TROUT, PLAZA ENTERTAINMENT CENTER, CYNTHIA SMITH, LAURIE JACOBS, WILLIAM E. LONG, ROBERT BEAMAN,
Defendants.

FINDINGS OF FACT AND ORDER

Comes now the Court on Plaintiff's Verified Petition for *Seizure of Property Subject to Forfeiture*, and being duly advised in the premises now finds and orders as follows:

1. Plaintiff Stephen Goldsmith is the duly elected prosecutor of this judicial circuit.

2. IC 34-4-30.5-2 and IC 34-4-30.5-3 authorizes the prosecuting attorney in a county in which a violation of

IC 35-45-6-2 occurs to bring an action for injunctive relief and forfeiture of property involved in such violation.

3. As a governmental agent, the prosecuting attorney is not required to post bond for such relief.

4. Defendants as recited in the Complaint are involved in the Burton Gorelick Enterprise.

5. There is probable cause to believe the defendants have violated the provisions of IC 35-45-6-2.

6. There is probable cause that the establishment at 6755 East 38th Street, Marion County, and known as Adult Toy and Gift is in violation of IC 35-45-6-2.

7. There is probable cause to believe the establishment at 4447 North Keystone, Marion County, Indiana, know as World Video Systems is in violation of IC 35-45-6-2.

8. Property at 4276 West 38th Street, and at the two establishments set out in paragraphs 6 and 7 above are subject to forfeiture.

Now therefore, it is ordered as follows:

1. The Indianapolis Police Department shall forthwith lock, *seal and secure* all property within the commercial building at 4276 West 38th Street, Marion County. Such building shall remain sealed until further order of this court.

2. Defendants shall preserve all property at World Video Systems, 4447 North Keystone, Indianapolis, Marion County, Indiana, and at Adult Toy and Gift, 6755 East 38th Street, Indianapolis, Marion County, Indiana until further order of this court. Defendants shall not transfer or remove from said buildings any fixtures, cabinets, cameras, audio or video equipment, cash registers or other property until further order of this court. This paragraph shall not prevent defendants at Adult Toy and Gift and World Video Systems from transferring or selling books, magazines, newspapers or video

tapes. However, until further order of this court, all other property shall be held by Defendants.

3. Defendants shall immediately list and state the location of all property, real and personal, including money, that Defendants own or have title to or any right, interest or equity in.

4. A trial on Plaintiff's request that all assets at all three stores shall be forfeited is now set for 9:00 a.m. Thursday, August 4, 1983. Defendants shall bring with them all records referred to in paragraph 3 above.

SO ORDERED this 1st day of August, 1983.

/s/ Anthony J. Metz
Judge
Marion Circuit Court

MOTION FILED
SEP 26 1988

No. 87-470

In The
Supreme Court of the United States
October Term, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

MOTION OF BURKE H. MENDENHALL FOR LEAVE TO INTERVENE

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INTHE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CAUSE NO. 87-470
	)	
	)	
STATE OF INDIANA, ET AL.	)	
	)	
Respondent.	)	

MOTION FOR LEAVE TO INTERVENE

Petitioner and Amicus Curiae, Burke Mendenhall (hereinafter "Mendenhall"), respectfully requests this Court to allow him leave to intervene to challenge the validity of an Order entered by the Marion County Circuit Court, The Honorable Anthony J. Metz on August 1, 1983, and the subsequent forfeiture of the leased premises on or about August 6, 1987, pending the final determination of the constituionality of the Indiana RICO Statute by this Court. In support of said Petition, Mendenhall would show the Court:

1. Mendenhall, currently a Defendant in the matter pending in the trial court below soley by virtue of his status as a landlord, is the only remaining landlord of the original twentytwo (22) Defendants. The other two (2) landlords originally named as Defendants were dismissed on motion of the Marion County Prosecuting Attorney on December 27, 1984. Petitioner believes that his real property is the only real estate in the State of Indiana subject to a pre-judgment forfeiture under the Indiana RICO Statute at the present time.

2. On October 30, 1987, Mendenhall filed an Amicus Curiae Brief in support of a Petition for Writ of Certiorari filed in this matter. On March 7, 1988, this Court granted the Writ of Certiorari.

3. Under 28 U.S.C. §2101(f) your Petitioner is a "party aggrieved" by the Order presently under review by this Court.

4. This motion for Leave to Intervene raises important constitutional questions involving the pre-judgment taking of Mendenhall's business real estate (hereinafter referred to as the "leased premises") on August 6, 1987 without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

5. This matter was initially filed in the Marion County Circuit Court, Indianapolis, Indiana, by the Marion County Prosecuting Attorney, Stephen Goldsmith, who alleged, among other things, that Mendenhall, owned the real estate at 4266 West 38th Street, Indianapolis, Indiana, the "leased premises", where an adult bookstore was engaged in racketeering activities as defined in the Indiana Racketeering Influence and Corrupt Organizations Act ("RICO"), Indiana Code 35-45-6-1, et seq.

6. On August 1, 1983, the Marion County Circuit Court, The Honorable Anthony J. Metz, Judge, in Cause No. C83-1788, issued its Findings of Fact and an Order declaring that the business property owned by Mendenhall, at 4266 West 38th Street, Indianapolis, Indiana, was subject to forfeiture under the remedies section provided in the Civil Remedies for Racketeering Activities ("CRRA"), Indiana Code 34-4-30.5-1, et seq. (hereinafter referred to as the "Forfeiture Order").

7. Following a change of venue from Marion County, the Hamilton County, Indiana Circuit Court entered an

Order on November 21, 1983, overruling a Motion of a co-defendant, Burton Gorelick, to vacate the Forfeiture Order, which ruling was then appealed to the Indiana Court of Appeals, Fourth District, as an Interlocutory Appeal in Consolidated Cause No. 4-1284 A 415.

8. On February 2, 1984, Chief Judge Paul H. Buchanan, Jr., Court of Appeals of Indiana, entered an Order upon Interlocutory Appeal modifying the Forfeiture Order of the Marion County Circuit Court dated August 1, 1983, pending the appeal of that matter to the Indiana Court of Appeals, which allowed the leased premises to be reopened.

9. The Indiana Court of Appeals for the Fourth District in 4447-Corp. v. Goldsmith, (1985), Ind. App.) N.E.2d 578, 592 held that the Civil RICO and CRRA statutes at issue constituted facially unconstitutional prior restraints in their application to the predicate offense of obscenity.

10. On March 2, 1987, the Indiana Supreme Court granted a Petition for Transfer, vacated the Opinion of the Indiana Court of Appeals, and remanded the matter to the Hamilton County Circuit Court for further proceedings not inconsistent with that Opinion. See 4447 vs. Goldsmith 504 NE 2nd 559 (Ind 1987)

11. Subsequent to the decision of the Supreme Court of Indiana, the Honorable James E. Noland, Judge, United States District Court for the Southern District of Indiana, in an unrelated criminal matter on June 5, 1987, under Cause Number IP86-20-CR-Ol entered an Amended Judgment and Order of Forfeiture in the case captioned United States of America v. Burton Gorelock directing Gorelick to vacate the leased premises at 4266 West 38th Street, Indianapolis, Indiana, and cease business operations at the Plaza Entertainment Center on or before March 2, 1987. A copy of that Order follows as appendix "A."

12. From on or about March 2, 1987, to and including August 3, 1987, the leased premises remained vacant at 4266 West 38th Street, Indianapolis, Indiana.

13. On or about August 3, 1987, a new business entity, unrelated to Burton Gorelock, described in paragraph 11 above, began business at the leased premises at 4266 West 38th Street, Indianapolis, Indiana.

14. On or about August 6, 1987, members of the Indianapolis Police Department, under the direction of the Marion County Prosecuting Attorney's Office, and not under the authority of any new Court Order, padlocked the leased premises under the authority of the August 1, 1983, Forfeiture Order of the Marion County Circuit Court in this matter.

15. On August 13, 1987, a representative of the Marion County Prosecuting Attorney's Office, Indianapolis, Indiana, advised Mendenhall's counsel that the new business located at the leased premises, was closed under the authority of the August 1, 1983, Order.

16. On August 19, 1987, a Petition for Stay of Execution of Forfeiture of the premises was filed with the Indiana Supreme Court. Although Mendenhall was not a party to the appeal to the Indiana Appellate Courts, he had standing as a Defendant in the trial court to seek a stay from the Indiana Supreme Court.

17. On September 2, 1987, the Indiana Supreme Court denied Mendenhall's request for a stay on the grounds that it lacked jurisdiction.

18. On March 29, 1988, Mendenhall filed an Emergency Petition for Stay of Execution of Judgment pending a decision by this Court with the Hamilton County Circuit Court.

19. An evidentiary hearing was held in the Hamilton County Circuit Court on May 24, 1988.

20. On May 27, 1988, the Hamilton County Circuit Court denied Mendenhall's Emergency Petition for a Stay.

21. On June 3, 1988, Mendenhall filed a second Petition for Stay of Execution of Judgment with the Indiana Supreme Court.

22. On June 17, 1988, the Indiana Supreme Court denied the Petition for Stay for no specified reason.

23. Mendenhall is in default on the mortgage payment for the leased premises which forced him to seek protection from the United States Bankruptcy Court for the Southern District of Indiana under Cause Number IP88-4174RAB on August 29, 1988.

24. Mendenhall continues to be irreparably injured and will continue to be denied the right to collect rents from any business tenant at the leased premises without the benefit of any judicial determination and/or order, and will be irreparably injured during the pendency of the case before this Court.

WHEREFORE, Petitioner Burke H. Mendenhall, Amicus Curiae herein, prays that he be granted leave to intervene in this matter before the Supreme Court of the United States.

Dated 9/30/88

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SEAL

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	NO. IP#86=29=CR=Ol
BURTON H. GORELICK, Defendant.	)	

AMENDED JUDGMENT AND ORDER OF FORFEITURE

Burton H. Gorelick, and others, were indicted in a second superseding indictment, drawn in nine counts, filed on June 11, 1986. In Count Nine of that indictment, it is alleged that Burton H. Gorelick, from about 1976 through the date of the indictment was employed by and associated with an enterprise, the affairs of which were conducted through a pattern of racketeering activity, as defined by Title 18, United States Code, Section 1961(5), in violation of Title 18, United States Code, Section 1962(e). In part B of Count Nine of the indictment the enterprise is described; in part C of said count of the indictment, racketeering activities are alleged. For the offense alleged in Count Nine of the indictment, forfeiture of certain assets of the defendant Burton H. Gorelick is sought, pursuant to Title 18, United States Code, Section 1963 et seq.

On February 26, 1987, the defendant Burton H. Gorelick entered a plea of guilty to Count Nine of the second superseding indictment filed in the above referenceed cause of action, and agreed to the forfeiture of property described as:

(a) Adult Toy and Gift, 6765 East 38th Street, Indianapolis, Indiana;

(b) Plaza Entertainment, 4266 West 38th Street, Indianapolis, Indiana.

The parcel of real estate at 6765 East 38th Street is more particularly described as follows: Lots 10, 11, 12, 13, 14 and 15 in Rowe's 38th Street Addition, an addition to the City of Indianapolis, as per Plat thereof, recorded in Plat Book 22, page 109, in the Office of the Recorder of Marion County, Indiana.

On February 26, 1987, a judgment and order of forfeiture was entered for the forfeiture of Adult Toy and Gift, 6765 East 38th Street, Indianapolis, Indiana, and Plaza Entertainment, 4266 West 38th Street, Indianapolis, Indiana. That judgment and order of forfeiture, insofar as it concerns Adult Toy and Gift, 6765 East 38th Street, Indianapolis, Indiana, covered only 42% of (what was believed to be the defendant's interest) the aforestated real estste.

The United States of America has moved to amend the judgment and order of forfeiture on the basis that, Pursuant to statute, Congress Vested title to said real estate in the United States as of October 12, 1984. It is alleged in the motion of the United States that Burton Gorelick, a defendant herein, wss the sole owner of record of the real estste at the 6765 East 38th Street,

Indianapolis, Indiana address, on October 12, 1984. Accordingly, it is the position of the United States of America that the entire parcel of real estate is forfeitable to the United States.

On consideration of the materially Pertinent statutes (18 U.S.C. 1961, 1962, and 1963); count 9 of the second superseding indictment: the defendant's plea of guilty to Count 9 of the second superseding indictment, the United States' motion to amend the February 26, 1987 order of forfeiture, and the supplementary material in support of the United States' motion to amend the February 26, 1987 order, the Court now finds that the motion of the United States is supported by the materially pertinent law and facts; and,

The Court hereby finds (1) that on May 14, 1982, Burton H. Gorelick purchased a parcel of real estate located at 6765 East 38th Street, Indianapolis, Indiana; (2) that Burton H. Gorelick recorded his interest in said real estate by recording a deed with the Marion County Recorder; (3) that on October 12, 1984, Burton H. Gorelick was sole owner of record to a parcel of resl estate located at 6765 East 38th Street, Indianapolis, Indiana; (4) that on October 12, 1984, there was in full force and effect, a statute known as the "Comprehensive Forfeiture Act of 1983" (PL 98=#73), Title 18, U.S.C. 1963, which vested title
in the Unitcd States of America; (5) that the period covered by Count 9 of the second superseding indictment is 1976 through the date of the filing of the second superseding indictment: (6) that the pattern of racketeering activi:y alleged in Count 9 of the second superseding indictment comes within the effective date of the "Comprehensive Forfeiture Act of 1983" (cited above): (7) that Burton H.

Gorelick, by his plea of guilty to Count 9 of the second superseding indictment, admits all of the material alleged facts and essential legal elements of said count of the indictment and all proper inferences and legal conclusions concerning said count of the indictment; (8) that Burton H. Gorelick has agreed to the forfeiture of his interest in the property described on page two of this Amended Judgment and Order of Forfeiture pursuant to a plea agreement; (9) that each and every alleged material fact and each and every essential legal element of Count 9 of the second superseding indictment are true; and, accordingly,

The Court concludes that based on defendant Gorelick's plea of Guilty, defendant Gorelick is guilty of the offense charged in Count 9 of the indictment and that the United States of America is entitled to judgment as prayed for in Count 9 of the Second Superseding Indictment.

It is hereby adjudged and ordered that the United States is entitled to judgment and an order of forfeiture, as prayed for in its motion to amend the order entered on February 26, 1987.

It is hereby ordered that the Court's judgment and order, or forfeiture of February 26, 1987, be, and the same is, hereby vacated.

It is hereby adjudged and ordered that Adult Toy and Gift, 6765 East 38th Street, Indianapolis, Indiana, and Plaza Entertainment, 4266 West 38th Street, Indianapolis, Indiana, should be, and the same are, hereby forfeited to the United States of America.

It is further hereby ordered that the United States Attorney General, shall seize said property and undertake such action as provided for by law to protect the interests of the United States, in said property ordered forfeited.

It is further hereby ordered that a copy of this order be recorded in the county in which the real property, described herein, is located, and that a copy of this order shall be recorded, or lodged, in the office of the Secretary of the State of Indiana, or such other state, where the property ordered forfeited, herein, is located.

It is further hereby ordered that the defendant Burton H. Gorelick relinquish the leasehold on the property known as Plaza Entertainment, located at 4266 West 38th Street, Indianapolis, Indiana to the lessor of said property, Burke H. Mendenhall, and that Burton H. Gorelick cease business operations at Plaza Entertainment, on or before March 2, 1987.

It is further hereby ordered that the defendant Burton H. Gorelick, alone, shall be responsible for the settlement of any and all claims made against him in connection with the said lease, without any assumption of, or responsibility by, the United States of America for the payment of damages, if any, as a result of the termination of the lease, referenced herein.

The Court shall retain continuing jurisdiction as is required for the completion of any and all orders herein issued.

Entered this 5th day of June, 1987.

James E. Noland
James E. Noland, District Judge
United States District Court
Southern District of Indiana

DATE: 5 JUN 1987

Copies to:

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Supreme Court, U.S.
FILED
AUG 5
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-470

In The
Supreme Court of the United States
October Term, 1987

—o—

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, et al.,
Respondents.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

—o—

REPLY BRIEF FOR PETITIONER FORT WAYNE BOOKS, INC.

—o—

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No. 87-470

In The

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FORT WAYNE BOOKS, INC.,

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REPLY BRIEF FOR PETITIONER FORT WAYNE BOOKS, INC.

ARGUMENT

I

INTRODUCTION

The issue in this case is not whether obscenity as currently defined by *Miller v. California,* 413 U.S. 15 (1973), may be regulated or punished. Misconstruing the essential nature of petitioner's facial challenge to the censorial *remedies* imposed by the civil RICO statute for predicate obscenity, respondents raise the shield of *Roth* and *Miller* as if petitioner sought to relitigate the scope of the underlying offense. On the contrary, Petitioner advocates only the well-entrenched principle that the regulation of obscenity requires procedures and remedies narrowly designed to avoid the suppression of non-obscene, protected expression.

Even less is the issue whether the state may punish nonexpressive criminal conduct such as murder and extortion, unfettered by the First Amendment. Respondents disregard the clearly-stated issues by insisting that petitioner challenges the seizure and forfeiture of communicative businesses no matter what the predicate offense, and thus advocates a rule creating "safe havens . . . for investment of the [proceeds] of organized crime." (Brief of Indiana Attorney General, pp. 9-10). Petitioner clearly challenges the statute only in its application to the predicate offense of obscenity.

Accordingly, the crucial issue at stake here is whether, as respondents urge, obscenity may be punished entirely without limitation, with no regard to the effects of the remedy upon protected expression. Respondents' distortion of the true import of this case betrays an awareness that their position is entirely at odds with decades of First Amendment decisions by this Court. *See Roth v. United States,* 354 U.S. 476 (1957); *Marcus v. Search Warrants,*

367 U.S. 717 (1961); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

Respondents ask this Court to alter the entire landscape of First Amendment review, debasing the standard of analysis whenever the state raises a talismanic cry of "racketeering" or some other provocative label for unprotected speech. They ask this Court to reverse the normal presumption of First Amendment protection, at least in the case of "adult bookstores" (to which the statute is not, of course, limited on its face), and to presume the illegality of erotic materials. (See particularly Brief of Respondent Goldsmith, p. 3, attempting to assign petitioner the burden of establishing non-obscenity: "Nothing in the record indicates that these stores . . . distributed any other materials that had any arguably serious . . . value.")[1]

As a corollary, this Court is asked to entrust often zealous, politically-motivated prosecutors with a statute hopelessly overbroad on its face, on the premise that they will not abuse the limitless power it affords them over the wares and even the continued existence of First Amendment businesses. As this Court has just reaffirmed in *City of Lakewood v. Plain Dealer Publishing Co.*, — U.S. —, 108 S.Ct. 2138 (1988), the grant of such unfettered discretion is *inherently* an abuse, and fundamentally at odds with our Constitution.

---

[1] The facts of the Indianapolis litigation are not directly before the Court, but petitioner is compelled to correct misimpressions created by respondent Goldsmith's account. One such inaccuracy is the repeated assertion that no prospective restraints were placed on the Indianapolis bookstores, when in fact the defendant's bookstore, scheduled to open for its first day of business on the day the complaint was filed, remained padlocked for six months pursuant to Goldsmith's complaint.

Most interestingly, just as the Justice Department has launched a vigorous campaign of RICO prosecutions seeking forfeitures of First Amendment businesses for predicate obscenity,[2] the Solicitor General has entered the fray here on behalf of the State in *Sappenfield v. Indiana*, but timorously attempts to avoid the issues of civil forfeiture and other post-trial restraints. However, he does obliquely address the pre-trial issues posed by *Fort Wayne Books:* under the federal RICO Act, the government "as a policy matter, . . . does not seek to restrain books, films, or other bookstore assets prior to conviction in a case involving predicate obscenity" (Brief of Solicitor General, p. 15). Apparently, the government perceives the general unconstitutionality of such pre-trial seizures.

Regarding the post-trial sanctions, the Solicitor General unjustifiably attempts (p. 15, n. 12) to avoid adjudication of their constitutionality by simply asserting that the issue is not before this Court, although the question has been accepted for review by this Court, squarely decided by the Indiana Supreme Court, and fully briefed by all parties. In light of its prosecutorial actions, the government's desperation to avoid the forfeiture issue is quite telling. The Solicitor General's participation here highlights the threat of *even more* draconian RICO penalties for obscenity violations, under the federal parent of Indiana's RICO Act.[3]

---

[2] The Government has actually obtained blanket forfeiture of five communicative businesses in *United States v. Pryba* (CR. No. 87-00208-A, E.D.Va. 1988), and a similar indictment seeking forfeiture is pending in *United States v. Sturman* (CR-S-87-278, D.Nev., filed October 7, 1987).

[3] Contrary to the Solicitor General's assertion that the federal statute "does not prescribe any minimum penalty," the

(Continued on following page)

Respondents and their other amici, although acknowledging the forfeiture issue, go to great lengths to avoid addressing petitioner's facial challenge by narrowly focusing on minute facts of this case which are largely immaterial, and by engaging in sensationalized accounts of alleged "mobster influence," which are completely irrelevant.[4] As in *Near v. Minnesota,* 283 U.S. 697, 708 (1931), petitioner presents a facial challenge: "the statute is . . . unconstitutional under any reasonable construction of its terms." On its face, it threatens and chills Waldenbooks as well as the adult bookstore.

Petitioner does, however, urge this Court's close attention to the egregious facts of the proceedings below, which illustrate the abuses this statute necessarily entails, and dramatize the real issue here: whether existing First Amendment principles limiting the regulation of obscenity will prevail, or be replaced by a radical regime of censorship and self-censorship.

(Continued from previous page)

current Sentencing Guidelines (§ 2E1.1 and § 5A) mandate a 30-37 month term for RICO offenses, without possibility of probation. Criminal RICO forfeiture, moreover, is blanket and *mandatory under* 18 U.S.C. § 1963(a). *See, United States v. Busher,* 817 F.2d 1409 (9th Cir. 1987). In contrast, the base penalty for arson under the Guidelines (§ 2K1.4(a) and § 5A) is 0-6 months.

[4] Petitioner categorically rejects these inflammatory, unsubstantiated allegations as completely beyond the record, factually inaccurate, and entirely irrelevant to this facial challenge. In lieu of a motion to strike these references as burdensome and scandalous pursuant to this Court's Rule 34.6, petitioner will simply note respectfully that Amici American Booksellers Association and the Video Software Dealers Association have not been alleged to be "gangster-controlled" and yet perceive their vital interests to be at stake here.

II

THE APPLICABILITY OF FIRST AMENDMENT ANALYSIS TO ASSESS THE IMPACT OF AN ANTI-OBSCENITY STATUTE UPON PROTECTED SPEECH IS BEYOND REASONABLE DISPUTE, AND RESPONDENTS HAVE COMPLETELY FAILED TO MEET THEIR BURDEN OF JUSTIFICATION UNDER THE APPROPRIATE FIRST AMENDMENT STANDARD OF REVIEW

Because respondents have no answer to petitioner's analysis of the RICO/obscenity statute's invalidity under the First Amendment, their only recourse is to deny the relevance of the First Amendment altogether. The essence of their argument, that the RICO Act has a "content-neutral" or "non-censorial" purpose, *i.e.,* combatting "racketeering" and seizing its "ill-gotten gains," is both inherently illogical and inadequate as a matter of constitutional law to insulate this statute from First Amendment scrutiny.

In the first place, respondents' argument would fail even if one were to concede that the RICO Act as applied to obscenity had no censorial purpose. Although a finding of legislative intent to censor presumptively-protected speech will normally *condemn* legislation under the First Amendment, such censorial intent need not be shown in order to demonstrate a First Amendment violation. *See Arkansas Writers' Project, Inc. v. Ragland,* — U.S. —, 107 S.Ct. 1722 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983). Moreover, respondents' arguments essentially concede, at times explicitly, that this application of the RICO Act amounts to nothing more than an extremely harsh anti-obscenity statute. As such, it must be analyzed under the

constitutional ground rules which have long governed obscenity litigation.

Although a censorial purpose need not be demonstrated, this Court in *Near v. Minnesota* found particularly objectionable the justification advanced by the state that criminal libel statutes did not effect "efficient repression . . . of the evils of scandal." 283 U.S. at 711. Likewise, responderts here betray an underlying censorial motive when they bemoan, explicitly or implicitly, the inefficient operation of ordinary anti-obscenity laws to suppress obscenity, and in fact a much wider range of protected erotic expression. That justification merely underscores the actual effect of the RICO statute, which inevitably operates to stifle a great deal of material never even alleged to be obscene, thus triggering the extremely strict scrutiny of the prior restraint doctrine.

Respondent argues that the entire bookstores, theaters, etc. which may be seized, forfeited and otherwise permanently foreclosed from public discourse are only "incidentally" restrained; they just happen to be included among the "ill-gotten gains of racketeering." This argument ignores two core realities of the RICO Act's operation as an anti-obscenity statute.

It is first of all illogical to characterize as "incidental" the closure of First Amendment businesses which will *necessarily* result from the statute's application to punish expressve conduct. The RICO/obscenity offense, by definition, requires nothing more than two instances of the commercial distribution of materials found to be obscene, presupposing the existence of a First Amendment business "enterprise" which will be subjected to seizure, forfeiture, and the remaining panoply of suppressive RICO

sanctions. Not only does the repressive result necessarily follow in fact; it is furthermore contemplated by the *announced purpose* of the statute in this context—the prospective curtailment of "racketeering," *i.e.*, obscenity. Inherently and by intent, the statute operates to close down First Amendment businesses which have done nothing more than engage in offending expression.

Secondly, there is in fact no requirement under the RICO Act that the forfeitable assets of the targeted "enterprise" have any real nexus at all to the illegal conduct, other than comprising part of that business. The state incorrectly characterizes the assets which may be seized, forfeited, etc. as "ill-gotten gains," although the Indiana Supreme Court has authoritatively construed the statute to authorize seizure by padlocking and corresponding blanket forfeiture. The statute therefore requires no derivative nexus between the dissemination of obscene items and the property which may be seized and forfeited.[5] Only under a hopelessly overbroad "contagion" theory can the state hope to sweep the entire communicative business into this dragnet.

There is, then, no justification independent of the two predicate obscenity violations for the imposition of these draconian, suppressive sanctions. Even a casual reading of respondents' briefs reveals the concession that in essence, RICO as applied here is merely an extraordinary anti-obscenity weapon. This concession is most readily

---

[5] RICO forfeiture is not limited to the proceeds from the unlawful sale of obscene materials. Thus, $5.00 acquired from the rental of two videotapes later determined to be obscene would trigger a total forfeiture of the entire communicative business. *Cf. J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984), *rev'd. on procedural grounds sub nom. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

apparent in respondents' characterization of these RICO civil remedies as "mere punishment," for two counts of commercial obscenity, labelled "racketeering."

The applicability of the usual heightened standards of First Amendment review to this situation, already clearly settled, has recently been reaffirmed in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172 (1986).[6] Every member of the *Arcara* Court would have agreed with Chief Justice Burger's acknowledgement that the closure of a bookstore "where it was conduct with a significant expressive element that drew the legal remedy in the first place" would invoke First Amendment scrutiny. 106 S.Ct. 3177. Justice O'Connor's concurrence, also representing a majority of the Court, expressly indicated that the First Amendment would govern a case such as this one, involving expressive predicate conduct. *Id.*

Petitioner has raised a more than colorable claim that this statute violates the First Amendment, demonstrating that these civil remedies for obscenity will inevitably close communicative businesses *in toto*, and otherwise deter protected First Amendment activity by direct injunction and by chilling effect. Therefore, the burden has shifted to the state to justify these impingements upon

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[6] Understandably, respondents are at great pains to cast petitioner in the role of the bookstore in *Arcara*, but must do so by ignoring the central distinction drawn in that case between expressive and noncommunicative predicate conduct. In his eagerness to equate the two cases, respondent Goldsmith creates an entirely false impression in suggesting that the Indianapolis RICO complaint was premised in part upon "live paid sexual performances" by individual performers as recounted in the supporting affidavit (Brief of Respondent Goldsmith, p. 6). In actuality, alleged obscenity forms the exclusive legal basis of the complaint in *Goldsmith v. 4447 Corporation*, and of course the statute on its face requires no additional, non-expressive illegal conduct to be alleged.

the First Amendment rights of speaker and public alike. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, n.5 (1984). Respondents' insistence that they need not be held to the standards of First Amendment review bears eloquent testimony to their own perceived inability to shoulder that burden.

III

THE RICO/OBSCENITY ACT'S PROVISIONS FOR PRE-TRIAL SEIZURE, POST-TRIAL FORFEITURE, AND OTHER CIVIL REMEDIES RESTRICTING FUTURE EXPRESSION, CONSTITUTE A SCHEME OF PRIOR RESTRAINTS REGARDLESS OF THEIR ASSERTED "CONTENT NEUTRALITY" AND REGARDLESS OF THEIR CHARACTERIZATION AS "SUBSEQUENT PUNISHMENT."

In outright defiance of both logic and precedent, respondents and their amici maintain that the RICO/obscenity Act's pretrial seizure provisions and post-trial civil remedies including blanket forfeiture of First Amendment businesses do not constitute a scheme of prior restraints. Completely mischaracterizing the doctrine of prior restraint as developed by this Court over the past half-century, respondents' arguments represent a back-door attempt to reverse the rule of *Near v. Minnesota*, a case indistinguishable in principle.

Like this petitioner, Near raised a facial challenge to a civil statute which authorized "abatement" of First Amendment activity as redress for prior instances of allegedly unprotected speech; a defamatory periodical could be "wholly abated" as a nuisance. 283 U.S. at 703. Precisely because of this remedy's direct prospective effect of suppressing future, presumptively-protected speech, the Court invalidated the law on its face as a prior restraint.

The Court found the law nonetheless objectionable even if applied to suppress future issues of publications "chiefly devoted" to allegedly unprotected speech, or to defendants who "regularly and customarily" engaged in such expression. *Id.* at 706, 723.

The Indiana RICO Act, creating prospectively-censorial civil sanctions for obscenity, bears an uncanny resemblance to the *Near* statute, which curtailed future speech by equating defamation with "nuisance." Emphasizing the statute's practical "operation and effect" in *Near*, the Court found this type of remedy effectuated "not punishment, in the ordinary sense, but suppression" of the offending publication. Id. at 711. The RICO Act operates in precisely the same manner, *i.e.*, to suppress the offending First Amendment business solely on the basis of prior speech. The only real distinction between the two statutory schemes is not one of kind, but of degree: the RICO Act's remedies are even broader and more repressive. Whether the asserted justification is punishment of the offensive speech, or forestalling the prospect of similar unprotected speech in the future (respondents embrace each rationale in turn at their convenience), this Court has unequivocally decided that direct restrictions upon future presumptively-protected expression represent constitutionally illegitimate means of achieving those ends.

Respondents essentially advance two arguments in their attempt to distinguish these RICO remedies from a classic prior restraint scheme of the *Near* type: the statute is said to be "content neutral," and to inflict "mere punishment" rather than prior restraint.

Respondents again rely upon the statute's "content neutrality" with regard to the protected expression

which may be restrained to justify its seizure and forfeiture. This contention simply misconceives the nature of the prior restraint doctrine, pursuant to which this Court has never found "content neutrality" with respect to the restrained expression to be a saving grace.

Near itself disapproved a statute which authorized abatement of the "scandalous and defamatory" periodical by suppressing future editions without regard to their contents. More recently, this Court in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), held invalid under *Near* a content-neutral injunction which operated "to suppress, on the basis of previous publications, distribution of literature 'of any kind.' " 402 U.S. at 418-419. Likewise, in the licensing context, the Court has consistently invalidated content-neutral restrictions, as in *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (striking down an ordinance forbidding distribution of "literature of any kind" without prior permission). Guided by this precedent, dozens of state and federal jurisdictions have invalidated analogous "nuisance abatement" closures of First Amendment businesses for predicate obscenity offenses, finding the remedy to constitute a prior restraint because of its prospective effect on protected expression, regardless of "content neutrality" as to the restrained speech. (See Petitioner's Brief at 36-38, n. 25.) Indeed, because the censorship of presumptively-protected expression is the essential evil the prior restraint doctrine is designed to prevent, such "content neutrality" only compounds, rather than lessens, the First Amendment violation.

Amicus Morality in Media inaptly cites in this regard the language of *Arcara v. Cloud Books, supra,* 478 U.S. 697, 106 S.Ct. 3172, 3177, n.2 (1986), distinguishing the bookstore closure predicated upon completely non-expres-

sive conduct from a prior restraint, both because no particular materials would be restrained, and because closure was not sought "on the basis of an advance determination that the distribution of particular materials is prohibited." Amicus neglects to note, however, that Chief Justice Burger went on immediately to emphasize that the closure order in *Arcara* had "nothing to do with any expressive conduct at all," a far cry from the censorial sanctions of the RICO Act as applied to punish alleged obscenity by violations. "Content neutrality" as to the restrained materials is immaterial where the prohibited conduct is expression; it does nothing to save the RICO Act with its limitless potential as a tool for censorship.

The state's second argument in attempting to disclaim the civil RICO Act's operation as a prior restraint is no more persuasive. For this purpose, respondents nimbly turn from a prospective focus on eliminating future "racketeering" to the characterization of RICO seizure, forfeiture, etc. as mere "subsequent punishment." Although respondents fail to explain how pre-trial padlocking amounts to "subsequent punishment," or how any of these remedies qualitatively differ in "operation and effect" from the injunction in *Near*, they rely heavily upon this formalistic distinction to stem the tide of First Amendment analysis.

If these civil (or similar criminal) penalties for offensive speech can be deemed "mere punishment" for obscenity, then the *Near* injunction could also be labeled "punishment" for the alleged defamation. Because the sanction in *Near* took the form of an injunction, however, the Court concluded that such a classic restraint upon future expression was directly censorial and "not punishment, *in the ordinay sense.*" 283 U.S. at 711 (emphasis added).

Although *Near* presented "no occasion to inquire as to the permissible scope of subsequent punishment," *id.* at 715, the Court focused realistically upon the remedy's censorial *effects* and certainly would not have hesitated to invalidate a statute forfeiting the offending publishing business to the state. The Court stressed that with regard to such constitutional questions, it would always evaluate "substance and not . . . mere matters of form," *id.* at 709; the state may not achieve an unconstitutional result simply by relabelling the offense or restructuring the remedy. Unquestionably, under *Near*, a remedy which interdicts unprotected speech by closing down an entire periodical, bookstore, video store, or other communicative business is not "punishment in the ordinary sense," but rather "the essence of censorship."

Respondents' various suggestions as to why these remedies do not constitute a prior restraint in practice reflect a stunning insensitivity to our Constitution's guarantees of free speech and press. Oblivious to the censorial impact of civil seizure and blanket forfeiture under the RICO Act, respondent Goldsmith (p. 35) finds RICO's effects "indistinguishable from the effect of a criminal fine." After acknowledging that forfeiture is tantamount to "legal death" (p. 18), Goldsmith proceeds to draw erroneous, facile comparisons with the situation in *Arcara*, asserting that "defendants would be free to engage in expressive conduct in the future at other times and places" (p. 39). In actuality, defendants may be enjoined from doing precisely that, pursuant to I.C. 34-4-30.5-2. Respondents also ignore pre-trial padlocking, and attempt to gloss over the threatened permanent removal of entire inventories of presumptively-protected expressive materials and their means of dissemination. These patent

infringements of First Amendment freedoms destroy both the right of booksellers to offer protected materials and the public's reciprocal right to receive them—surely the forbidden "essence of censorship."

IV

RESPONDENTS HAVE ENTIRELY MISREPRESENTED THE REALITIES OF THE RICO/OBSCENITY STATUTE'S CHILLING EFFECT UPON A WIDE RANGE OF PROTECTED EXPRESSION

In keeping with their central premise that obscenity offenses may be punished without limitation, regardless of the consequences for protected speech, respondents contend that these dire RICO penalties create no cognizable chill of free expression. Unable to refute petitioner's arguments demonstrating the statute's chilling effect, they again deny its constitutional relevance and cavalierly dismiss the statute's potential chill by distorting the prevailing realities of obscenity prosecutions.

Respondents argue that whatever chill flows from these unprecedented sanctions is the "wholly legitimate consequence" of RICO's deterrent effect as an anti-obscenity statute, as the Court said in *United States v. Pryba, supra,* 674 F.Supp. 1504, 1512-13 (1987). RICO statutes are "intended" to have a chilling effect on the distribution of unprotected materials (Brief of Indiana Attorney General, p. 16). Respondents' position that these statutes need not be evaluated with regard to their deterrence of other, *protected* expression makes a mockery of the chilling effect doctrine.

If the federal courts were to adopt a mandatory death penalty for Rule 11 violations, one could predict with some assurance that the incidence of frivolous arguments and

meritless pleadings would fall off dramatically. At the same time, zealous advocacy would correspondingly decline, completely eclipsed by crippling caution. Likewise, the suppression via self-censorship of innumerable protected books, periodicals, videotapes and the like, under the regime of fear RICO's looming shadow creates, represents the overbroad deterrence this Court has deemed too dear a price to pay for the suppression of unprotected speech.

As this Court has recognized in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and subsequent cases including most recently *Hustler Magazine v. Falwell,* — U.S. —, 1008 S.Ct. 876, 880 (1988), protected speech may be impermissibly deterred when unprotected speech is sanctioned by limitless penalties of the type RICO prescribes. The Court's observation in *Smith v. California,* 361 U.S. 147, 154-155 (1959), that "any form of criminal obscenity statute . . . will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene," was hardly meant to approve such deterrence. Rather, the Court in *Smith* invalidated even a minimally punitive misdemeanor obscenity ordinance for its failure to require *scienter* and thus to temper the law's chilling effect. The central teaching which emerges from this Court's decisions in *Smith, N.Y. Times,* and their progeny, suggests that the low threshold of *scienter* now required for obscenity, the inherent imprecision of the concept of obscenity, and these unprecedented, limitless penalties inevitably have the combined effect of widely chilling of protected speech.

This Court has continually recognized, in a long line of cases beginning with *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66 (1963), and continuing well past *Miller*, that

only "a dim and uncertain line" separates protected expression from obscenity.[7] Regardless of whether the *Miller* test has reduced that vagueness problem to a constitutionally tolerable level, the near-impossibility of determining what is obscene in advance of litigation remains an indisputable fact.

Respondents transparently attempt to oversimplify the complexities and unpredictability of obscenity litigation. They repeatedly refer to "serious value," or lack thereof, as if it were the only element of the obscenity test. (See Brief of Respondent Goldsmith, p. 3). (Indeed, if the *Miller* test were so limited to this one element, the comedy of Benny Hill and "elevator music" might well be deemed unprotected expression.) In the same vein, their amici strongly imply that *any* graphic depiction of sexuality may be proscribed. (See Brief of Arizona Attorney General, p. 46; Brief of District Attorney's Association, premised throughout upon the notion that the entire genre of erotic film is a generalized evil which must be eliminated; and Brief of James Clancy, which documents the fare of adult cable television, an immensely popular medium which amicus apparently feels could be effectively eradicated by means of RICO.) Of course, these assertions are starkly in conflict with the decisions

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[7] The *Bantam Books* language has since been cited in recognition of persistent vagueness problems in *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 311 (1980) (quoting district court decision which it upholds, 404 F.Supp. 33,44); *McKinney v. Alabama*, 424 U.S. 669, 685 (1976) (Blackmun, J., concurring); *Blount v. Rizzi*, 400 U.S. 410, 416 (1971); *Jacobellis v. Ohio*, 378 U.S. 184, 187 (1964); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964). The divergent opinions in *Pope v. Illinois*, — U.S. —, 107 S.Ct. 1918 (1987), witness the continuing lively debate regarding obscenity's inherent vagueness.

of this Court.[8] Respondents and their amici disregard completely the rapidly-growing popularity and demonstrably increased acceptance of such candid erotic expression in virtually every community in this country, such that "hard-core" cannot be equated with obscenity, under the *Miller* test.

Respondents persistently assert that no "mainstream" materials of any arguable value are ever prosecuted for obscenity (See Goldsmith, p.28; District Attorneys, pp. 8-12; Clancy, *passim*.). In this regard, petitioner would commend to this Court a close reading of the facts recited in the recent case of *Council for Periodical Distributors Association v. Evans*, 642 F.Supp. 552 (M.D.Ala.1986), along with numerous other reported cases in which zealous prosecutors and other moral crusaders have threatened the censorship of "mainstream" men's magazines such as *Playboy*, *Penthouse* and *Hustler*.[9] These reported cases reveal the tip of a very large iceberg of political pressure currently being exerted upon the entire sphere of erotic speech.

There simply is no "well-marked off" borderline defining obscenity, such that one can cite "Deep Throat"

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[8] Under the *Miller* test, erotic materials are not obscene unless they not only contain sexually-explicit depictions, but also: (1) appeal to a shameful or morbid, rather than a normal, interest in sex; (2) would be found patently offensive by the average adult in the community; and (3) also lack serious value. *See Brockett v. Spokane Arcades, supra*, 472 U.S. at 501, which reaffirmed that sexually-explicit depictions could not be branded obscene without meeting all three parts of the *Miller* test.

[9] *See Playboy v. Meese*, 639 F.Supp. 581 (D.D.C. 1986); *Penthouse International, Ltd. v. McAuliffe*, 436 F.Supp. 1241 (N.D.Ga. 1977), *aff'd. in part and rev'd. in part*, 610 F.2d 1353 (5th Cir. 1980); *State v. Walden Book Co.*, 386 So.2d 342 (La. 1980).

as "a typical example of a 'hardcore' movie consistently held to be obscene." (District Attorneys, pp. 9,12.) (In fact, that film has been deemed non-obscene in several proceedings, and for years has been a standard film in the inventories of general video stores around the country.) Contrary to respondents' assurances, *Jenkins v. Georgia*, 418 U.S. 153 (1974), does not demonstrate simply that "prosecutions must be limited to 'hard-core' pornography;" it also illustrates the possibility of grave error and the wildcard nature of obscenity prosecutions. Under the regime of RICO, moreover, the exhibitors of "Carnal Knowledge" could have been subjected to pre-trial padlocking of their theater(s), with all their assets under post-trial forfeiture order pending litigation all the way through this Court's ultimate determination of non-obscenity. Undoubtedly, such a prosecution would have brought about their total ruin.

It is small wonder that this case has drawn the avid and concerned participation of Amici American Booksellers Association and Video Software Dealers Association. Their memberships are properly alarmed about the threat of RICO/obscenity prosecutions and the self-censorship that threat imposes. Of course, to respondent's amici, this chill is all to the good, because they would seek the suppression of the widest range of non-obscene sexual speech. Petitioner agrees with their perception that RICO represents a highly effective tool in that campaign of repression.

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CONCLUSION

The First Amendment is designed to protect the free flow of expression and a plurality of opinions in this nation, by insulating controversial sentiments and materials from the vagaries of censorial pressures. Somewhat ironically, in light of the prosecutorial zeal witnessed by this case, sexually-oriented materials are today extremely popular; a great many adults clearly find them desirable as entertainment or otherwise. There is a tremendous diversity of opinion regarding erotic materials, notably among women, including those who consider themselves feminists.[10] Our constitutional framework does not allow for strident, politicized pressure groups to have government enforce their moral views as to the desirability of such widely tolerated, non-obscene materials.

The import of this litigation, however, reaches far beyond the immediate attempts to censor candid treatments of sexuality, that "great and mysterious force in human life, [which] has indisputably been a subject of absorbing interest to [humanity] through the ages; . . . one of the vital problems of human interest and public concern," as this Court noted in *Roth, supra,* 354 U.S. at 487. As evident in *Roth,* this Court has never wavered from the constitutional principle that unprotected speech can be regulated only with due regard for protected speech. Defending a statute which on its face contemplates the pre-trial seizure and post-trial forfeiture of entire bookstores and

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[10] For a well-articulated feminist advocacy of freedom from censorship of adult, sexually oriented expression, see, e.g., *Women Against Censorship,* (V. Burstyn, ed., 1985); *Caught Looking: Feminism, Pornography and Censorship* (F.A.C.T. Book Committee, 1986).

publishing companies, suppressing non-pornographic and non-obscene erotic materials alike, respondents would remove this essential cornerstone of First Amendment jurisprudence. Petitioner urges the Court to reaffirm this bedrock principle and to strike the statute as applied to obscenity for facial overbreadth, as a prior restraint and for its indirect chill upon the realm of free expression the First Amendment must jealously protect.

DATED: August 6, 1988

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Nos. 87-470 and 87-614

In the

Supreme Court of the United States

October Term, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

and

RONALD W. SAPPENFIELD, FANTASY ONE, INC., and FANTASY TWO, INC.,
Petitioners,

vs.

STATE OF INDIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS FOR THE FIRST DISTRICT

MOTION OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AND INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED.

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STATEMENT

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, and the International

Periodical Distributors Association, Inc. (collectively referred to as *amici*), hereby respectfully move for leave pursuant to Rule 42 of the Rules of the Supreme Court of the United States to file the attached joint brief, *amici curiae,* in support of the petitioners, Fort Wayne Books, Inc., Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy Two, Inc. Attorneys for petitioners consented thereto; the consent of the attorney for respondents was requested but refused.

The Amici

The *amici's* members publish, produce, distribute, and sell books, magazines, and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is the major national association of booksellers in the United States. ABA has approximately 4,000 members consisting of over 6,000 retail outlets. The members include private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is the major national association in the United States of publishers of general books, textbooks and educational materials. Its members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is the national trade association for almost four hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

Interest of the Amici

The interest of *amici* reflects their continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on materials with sexual content. *Amici's* brief will demonstrate how the legal principles involved in these two cases impact upon those who produce, distribute and sell material which is not obscene.

Although the cases *sub judice* involve "adult" bookstores, the RICO statute upheld by the Indiana Supreme Court, and similar RICO statutes in other jurisdictions,[1]

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[1] The Indiana RICO statute is modeled after the Federal RICO statute (18 U.S.C. § 1961 *et seq.*) and is similar to the RICO statutes of many other states.

are by no means limited to businesses which deal primarily in sexually explicit materials. In fact the padlocking of stores and massive seizure of printed materials involved in the two cases decided below did not distinguish between obscene and First Amendment protected materials. Everything was seized. The statute is drawn so broadly that it permits the massive seizure and forfeiture of assets, including non-obscene books and periodicals, from a business that does not carry a single obscene title but is shown only to have violated provisions relating to materials deemed "harmful to minors." Such a harsh possible result obviously chills the exercise of First Amendment rights by the legitimate booksellers, distributors and publishers who are the members of *amici*.

This concern of legitimate businesses is not unwarranted. There has been rising agitation directed against booksellers, publishers and distributors handling First Amendment protected materials. *Amici* cite but a few troubling recent examples. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but which were adjudged to be protected by the First Amendment. See *Council for Periodical Distributors Association v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987). At the national level, the Attorney General's Commission on Pornography ("Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order requiring the retraction of the charge and advice to the recipients that earlier communications from the Commission were of

no legal effect and to be ignored. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986). In its subsequent July 1986 report, the Commission not only endorsed broad new law enforcement initiatives, but also encouraged "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment. Attorney General's Commission on Pornography, *Final Report*, 421-23 (July 1986).

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides as effective means to substantially eliminate obscenity businesses." *Id.* at 435, 498. Although the Commission did not say so, RICO also provides an effective means to eliminate legitimate businesses which may have inadvertently crossed the gray line between what is obscene and what is not, as well as an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which may not meet with the approval of a faction in the community.

Unless the Court reaffirms the existing doctrine relating to prior restraints, and continues to insist on adequate procedural safeguards where seizures of presumptively First Amendment protected materials are involved, RICO statutes like the Indiana law in these cases will surely chill the production and distribution of a wide range of First Amendment protected materials.

Amici filed an *amicus* brief in *Fort Wayne Books, Inc. v. Indiana* in support of the petition for certiorari, their

motion to file same having been granted. 108 S. Ct. 1106 (1988).

In view of the foregoing, *amici* seek leave to file the attached brief.

Respectfully submitted,

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Dated: May 11, 1988

Nos. 87-470 and 87-614

In The
Supreme Court of the United States
October Term, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,
vs.
STATE OF INDIANA, et al.,
Respondents.

and

RONALD W. SAPPENFIELD,
FANTASY ONE, INC., AND
FANTASY TWO, INC.,
Petitioners,
vs.
STATE OF INDIANA,
Respondent.

BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AND INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., AS AMICI CURIAE, IN SUPPORT OF PETITIONERS.

STATEMENT

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, and the International Periodical Distributors Association, Inc. (collectively re-

ferred to as *amici*), submit this joint brief, *amici curiae*, Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy in support of the petitioners, Fort Wayne Books, Inc., Two, Inc., having submitted a motion for permission to file same.

Interest of the Amici and Summary of Argument

The interest of the *amici* reflects their continuing interest in the decisions of this Court balancing First Amendment rights and restrictions on materials with sexual content. *Amici's* brief will demonstrate how the RICO penalties at issue in these two cases create an unconstitutional prior restraint on First Amendment protected materials, and will have a chilling effect on the activities of those who produce, distribute and sell material which is not obscene.

Although the cases *sub judice* involve "adult" bookstores, the RICO statute upheld by the Indiana Supreme Court, and similar RICO statutes in other jurisdictions, are by no means limited to businesses which deal primarily in sexually explicit materials. In fact the padlocking of stores and massive seizure of printed materials involved in the two cases decided below did not distinguish between obscene and First Amendment protected materials. Everything was seized. The statute is drawn so broadly that it permits the massive seizure and forfeiture of assets, including non-obscene books and periodicals, from a business that does not carry a single obscene title but is shown only to have violated provisions relating to materials deemed "harmful to minors." The threat of such a death penalty on one's business obviously chills the exercise of First Amendment rights by booksellers, distributors and publishers who are not themselves dealers in obscene ma-

terials. Cautious booksellers would avoid any publication which treads too close to the obscenity or "harmful to minors" threshold for fear of triggering draconian RICO penalties.

The concern of legitimate businesses that these RICO statutes will be used to curtail protected speech and publishing activities is hardly speculative. There has been rising agitation directed against booksellers, publishers and distributors handling First Amendment protected materials. *Amici* cite but a few troubling recent examples. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but which were adjudged to be protected by the First Amendment. See *Council for Periodical Distributors Association v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987). At the national level, the Attorney General's Commission on Pornography (the "Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order requiring the retraction of the charge and advice to the recipients that earlier communications from the Commission were of no legal effect and to be ignored. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986). In its subsequent July 1986 report, the Commission not only endorsed broad new law enforcement initiatives, but also encouraged "private" boycotts, picketing, and other "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment. Attorney

General's Commission on Pornography, *Final Report* at 421-23 (July 1986).

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides an effective means to substantially eliminate obscenity businesses." *Id.* at 435, 498. Although the Commission did not say so, RICO also provides an effective means to eliminate legitimate businesses which may have inadvertently crossed the gray line between what is obscene or "harmful to minors" and what is not, as well as an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which offends a vocal minority within a community.

Amici contend that the Indiana RICO statute and similar statutes violate the First Amendment in that they constitute an unconstitutional prior restraint on First Amendment protected materials under the doctrine first defined in *Near v. Minnesota*, 283 U.S. 697 (1931), that the statutes will have a chilling effect on First Amendment protected expression, and, further, that the statutes do not include the special protections that the Court has consistently imposed with respect to the seizure of presumptively First Amendment protected material.

The Challenged Statute

The Indiana RICO statute was enacted in 1980, and is similar to the federal RICO statute, 18 U.S.C. § 1961 *et seq.* Basically, the statute provides that anyone who

acquires, maintains, or participates in any business through a "pattern of racketeering activity" is guilty of "corrupt business influence," a Class C felony. Ind. Code § 35-45-6-2. A pattern of racketeering activity is in turn defined as commission in the course of five years of two related offenses from a list of specified offenses. Ind. Code § 35-45-6-1. As interpreted by the Indiana Supreme Court, conviction for the offenses is not required. *4447 Corporation v. Goldsmith*, 504 N.E.2d 559, 566 (Ind. 1987). The list of offenses includes all Indiana obscenity law crimes. These crimes include not only importation or sale of obscene matter (Ind. Code § 35-49-3-1), but also disseminating to minors matter harmful to minors, displaying matter harmful to minors in an area to which minors have visual, auditory or physical access, or displaying for sale matter harmful to minors within 500 feet of a church or school. (Ind. Code § 35-49-3-3). In addition to the criminal penalty, the State may invoke the full panoply of civil sanctions contained in Indiana Code Sections 34-4-30.5-1 through 30.5-4.

The civil remedies available for a violation of the Indiana RICO law are severe. They include forfeiture of any property derived from or used in the course of the RICO violation. Ind. Code § 34-4-30.5-3. Property may even be seized for forfeiture, and placed under seal or removed, by an officer on ex parte court order up to 180 days prior to the filing of any formal adversary forfeiture action. Ind. Code § 34-4-30.5-4. In the cases *sub judice* the entire contents of several bookstores were seized, without even an *ex parte* review of most of the material, which included First Amendment protected materials. In

fact, the Indiana Supreme Court stated it to be "irrelevant" whether the assets seized and forfeited were obscene or not. 504 N.E.2d at 565. In addition, the Court may, on the bringing of an action to enjoin a violation, issue an injunction "prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of" the RICO law. Ind. Code § 34-4-30.5-2(2).

An injunction will be granted on a showing by a preponderance of the evidence that a RICO violation has occurred. Similarly, property may be civilly forfeited on a showing by a preponderance of the evidence that the property was derived from or used in the course of a RICO violation. Thus, massive forfeitures of property and injunctions against engaging in similar businesses in the future may be effected even without a criminal conviction for the triggering violations, which, if it were required, would require proof beyond a reasonable doubt. As described by the Indiana intermediate appellate court, the RICO statute permits "seizure orders of indefinite duration and create[s] a remedy of permanent forfeiture which would extend the protected materials and neutral instrumentalities." *4447 Corporation v. Goldsmith*, 479 N.E.2d 578, 590 n. 8 (Ind. Ct. App. 1985).

ARGUMENT

I

THE INDIANA RICO STATUTE CONSTITUTES AN UNCONSTITUTIONAL PRIOR RESTRAINT WHEN APPLIED BASED ON PREDICATE OFFENSES RELATING TO PRESUMPTIVELY FIRST AMENDMENT PROTECTED MATERIAL.

The Indiana RICO statute provides for pre-judgment seizure and subsequent forfeiture of "any property used in the course of, intended for use in the course of, derived from, or realized through" a RICO violation. Ind. Code §§ 34-4-30.5-3 and 30.5-4. The overwhelming majority of books in a typical bookstore are not obscene, and most could not be deemed harmful to minors. Nevertheless, if over a five year period a store twice sold books judged by a particular community to be obscene, or sold to two minors books deemed harmful to those minors, or even, under the Indiana law, merely displayed two books harmful to minors in an area accessible to minors, the entire inventory of the store and all of its assets would be subject to forfeiture.[2] The store would thus be prevented from distributing the protected materials which at all times constituted an overwhelming portion of its business. The intent and obvious effect of this forfeiture provision (as demonstrated by its enforcement in this case and its companion cases below) is to cause a forfeiture of the entire business enterprise through which the violation was com-

[2] It may, in fact, subject the assets of an entire chain of stores to seizure and forfeiture. In a recent federal RICO indictment brought in the Eastern District of Virginia, forfeiture of a chain of video stores was sought. *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987).

mitted, and thereby prevent the individuals involved from continuing in the same general line of business. Ind. Code § 34-4-30.5-2(2) lends further support to this construction, since it expressly authorizes a court to issue an injunction prohibiting a defendant from engaging in a similar business.

When the predicate offense relates to sexually explicit materials and when the business is a bookstore, chain of stores, distributor of written materials, or publisher, these RICO penalties clearly constitute a prior restraint violative of the First Amendment. The Court has consistently stated that "[a]ny system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc. v. Sullivan,* 372 U.S., at 70; *New York Times Co. v. United States,* 403 U.S., at 714; *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne,* 393 U.S. 175, 181 (1968); *Near v. Minnesota ex rel. Olson,* 283 U.S., at 716. The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable. See *Speiser v. Randall,* 357 U.S. 513 (1958)." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558-559 (1975) (quoted with approval in *Vance v. Universal Amusement Co.,* 445 U.S. 308, 316 n. 13 (1980)).

The prior restraint imposed in these two cases and generally permitted under the Indiana and other similar RICO statutes is virtually identical to that struck down by the Court over 50 years ago in *Near v. Minnesota,* 283 U.S. 697 (1931). The statute in *Near* authorized enjoining a person who published an obscene or defamatory periodical from further publication of the periodical. Consistently since *Near* it has been clear that one cannot be punished for speech by the prohibition of future speech. *See, e.g., City of Paducah v. Investment Entertainment, Inc.,* 791 F.2d 463 (6th Cir.), *cert. denied,* 107 S. Ct. 316 (1986); *Gayety Theaters, Inc. v. City of Miami,* 719 F.2d 1550 (11th Cir. 1983); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.,* 485 F. Supp. 777 (D. Utah 1980).

Notwithstanding *Near* and its progeny, the Supreme Court of Indiana swept aside prior restraint concerns by reasoning that the RICO statute's forfeiture remedy

> "is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity. Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene."

4447 Corporation v. Goldsmith, 504 N.E.2d at 565 (Ind. 1987).

This Court, however, has made clear that the question of whether a statute operates a prior restraint must be determined not through such formal anaylsis but through a realistic inquiry into the actual effects of the

statute on protected expressive activity. As stated in *Near,* "in passing upon constitutional questions the court has regard to substance and not to mere matters of form . . . ; in accordance with familiar principles, the statute must be tested by its operation and effect." *Near v. Minnesota,* 283 U.S. at 708. As further stated in *Organization For A Better Austin v. Keefe,* a prior restraint exists where "the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature. . . ." 402 U.S. at 418-419 (1971).

The plain effect of the forfeiture provision is to restrain future expression because of the content of prior expression. The court below avoided First Amendment analysis merely by recharacterizing the seized books and periodicals as "assets acquired through racketeering activity," indistinguishable from drugs, gambling equipment or other contraband. No such facile recharacterization can alter the fact that the statute's seizure and forfeiture provisions create the substantive harm that prior restraint doctrine aims to prevent—the repression of valuable expressive materials, which have not been adjudged obscene, as a consequence of prior speech. Labelling such expression as "racketeering" can no better strip away First Amendment protection than does labelling speech or speakers as "Nazi" (*Collin v. Smith,* 578 F.2d 1197 (7th Cir.), *cert. denied,* 439 U.S. 916 (1978)); "Communist" (*DeJonge v. Oregon,* 299 U.S. 353 (1937)); anti-semitic (*Near v. Minnesota, supra*); or "subordinators of women"

(*American Booksellers Ass'n, Inc. v. Hudnut,* 774 F.2d 323 (7th Cir. 1985), *aff'd,* 475 U.S. 1001 (1986)).[3]

The flaw in the Indiana RICO provisions is thus the same as in both *Near* and *Vance v. Universal Amusement Co.,* 445 U.S. at 311, fn. 3:

> In both cases the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be "dim and uncertain." *Bantam Books v. Sullivan* [cite omitted]. The separation of these forms of speech calls for "sensitive tools," *Speiser v. Randall* [cite omitted].

Such sensitivity is hardly shown by the statement of the court below that the separation between obscene and protected materials is "irrelevant."

While the RICO statute's forfeiture penalties clearly operate as an unconstitutional prior restraint when applied, perhaps more ominous and pervasive is the chilling effect which the mere threat of these draconian penalties will have on protected First Amendment activities. Booksellers, distributors and publishers will doubtless be inclined to avoid a provocative publication which may be viewed by

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[3] To the extent that crimes of violence or coercion are committed in the production of sexually-oriented material, state and federal laws, including RICO laws, provide ample opportunity for the prosecution of perpetrators. The only effect of adding the specific crime of dealing in obscenity to the list of predicate RICO offenses is to target RICO's harsh penalties at those who are criminals solely because the content of their speech is offensive. Hence, the ones prosecuted under the statute *sub judice* are not organized criminals or those who allegedly use kidnapping, violence, drugs, or coercion in the course of producing obscene material.

some as too close to the obscenity threshold when an error in judgment could lead to the forfeiture of one's business. The threat to First Amendment protections is always especially acute where questions of obscenity or "harmful to minors" are involved because "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." *Bantam Books v. Sullivan*, 372 U.S. at 66 (1963). While the question of whether a chemical substance is an illegal drug may be determined objectively in any laboratory, the determination as to whether books or periodicals are obscene will vary from community to community, and from jury to jury, as each applies the standard of *Miller v. California*, 413 U.S. 15 (1973). The threshold of First Amendment protection becomes even dimmer and less certain when the "harmful to minors" standard of *Ginsberg v. New York*, 390 U.S. 629 (1968), is at issue, since such material by definition is First Amendment protected and has serious literary, artistic, political, or scientific value.[4]

Many familiar examples serve as reminders that books now recognized as literary classics were once banned as obscene under the standards of their day. If a RICO statute like the one involved in these cases had been widespread a few decades ago, booksellers might have had

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[4] That such "harmful to minors" statutes are subject to a multitude of widely divergent interpretations is well demonstrated by this Court's recent decision in *Virginia v. American Booksellers Association, Inc.*, 108 S. Ct. 636 (1988) (certifying to the Virginia Supreme Court the question of how such a statute should be interpreted). In the absence of a definitive state court interpretation of a "harmful to minors" statute, a bookseller could find his store padlocked after an ex *parte* RICO hearing merely because he had sold or displayed copies of a provocative bestseller to minors.

their doors padlocked merely for stocking the latest copies of works by Theodore Dreiser, D.H. Lawrence, or Edmund Wilson. *Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930) (Dreiser's *An American Tragedy* held obscene); *Commonwealth v. Delacey*, 271 Mass. 327, 171 N.E. 455 (1930) (Lawrence's *Lady Chatterley's Lover* held obscene); *People v. Doubleday & Co.*, 272 App. Div. 799, 71 N.Y.S. 2d 736, *aff'd* 297 N.Y. 687, 77 N.E.2d 6 (1947), *aff'd* 335 U.S. 848 (1948) (Wilson's *Memoirs of Hecate County* held obscene). Such cases as *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986) and *Council for Periodical Distributors Association v. Evans*, 642 F.Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987), show the real danger that a vocal minority in a community will use the RICO statutes to threaten the very business of any bookseller who deals in material which, though constitutionally protected, they deem objectionable. The burden will be particularly great on a regional or national book or periodical business which, by distributing material which might be considered obscene or harmful to minors in only two communities in the state, could potentially have its entire business seized.

II

THE INDIANA RICO STATUTE IS ALSO UNCONSTITUTIONAL BECAUSE IT LACKS ANY OF THE PROCEDURAL SAFEGUARDS REQUIRED WHEN PRESUMPTIVELY FIRST AMENDMENT PROTECTED MATERIALS ARE SEIZED.

The Indiana RICO statute is also unconstitutional and should also be invalidated for failure to comply with the Court's prior rulings imposing procedural safeguards on

the seizure of presumptively First Amendment protected materials. Under the statute, property may be seized for forfeiture up to 180 days before any forfeiture action is even commenced. Ind. Code § 34-4-30.5-4. Furthermore, when the forfeiture proceeding is eventually filed, the statute imposes n fixed time limit for judicial resolution of the action, and does not even urge that resolution be prompt. In both of the cases under review, the trial courts' orders compelling the padlocking of bookstores and the seizure of all items within were issued after *ex parte* hearings, without notice to the booksellers or their attorneys. To this day, no trial date has been set in either case. This open-ended period of seizure, based on a mere probable cause showing, violates the requirement that "any restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Freedman v. Maryland*, 380 U.S. 51, 59 (1965).

As stated in *Speiser v. Randall*, 357 U.S. at 525 (1958), the separation of obscene and protected speech requires "sensitive tools." State and federal RICO statutes are anything but sensitive tools, as evidenced by the statement of the Indiana Supreme Court that the obscenity or non-obscenity of the seized assets is irrelevant.[9] *4447 Cor-*

[9] Even where First Amendment concerns are absent, the RICO penalty provisions have been severely criticized as crude and insensitive tools, lacking in various procedural safeguards. *See, e.g.*, Markus, *Procedural Implications of Forfeiture Under RICO, the CCE and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure*, 59 Temple L. Q. 1097 (1986); Note, *Civil RICO Is A Misnomer: The Need for Criminal Procedural Protections In Actions Under 18 U.S.C. § 1964*, 100 Harvard L. Rev. 1288 (1987).

poration v. Goldsmith, 504 N.E.2d at 565. To permit the broadscale seizure and forfeiture of protected expressive materials by means of RICO statutes is to make a mockery of the constitutionally required procedural safeguards imposed to guard against prior restraint of materials presumptively protected by the First Amendment.

CONCLUSION

As this Court has recently reiterated, "[f]reedoms of expression require 'breathing space.'" *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 880 (1988) (quoting *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986)). Moreover, the prior restraint doctrine is premised on the conviction that the circulation of offensive speech is a lesser cost than the unacceptable alternative of suppressing protected expression. As Madison said of the press: "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits." 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 571 (J. Elliott ed. 1866). Whatever the wisdom of pursuing the eradication of sexually explicit materials, attempts to eliminate them can only be undertaken after complying with First Amendment requirements of heightened sensitivity, and procedural safeguards so that provocative, unorthodox and even offensive ideas and modes of expression are not quashed.

For the reasons set forth above, we respectfully urge this Court to reverse the orders under review.

May 11, 1988

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No. 87-470

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

v.

STATE OF INDIANA, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Indiana

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PHE, INC. IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-470

FORT WAYNE BOOKS, INC.,
Petitioner,

v.

STATE OF INDIANA, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Indiana

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

PHE, Inc. ("PHE") hereby respectfully moves for leave to file the attached brief *amicus curiae.* The attorney for petitioner has consented; the attorney for respondents has refused consent.

PHE is a North Carolina corporation engaged in the business of mailing throughout the nation various materials protected by the First Amendment, including sexually explicit magazines and videotapes, contraceptives, a medical newsletter entitled *Sex Over Forty* (which is edited by a physician), and a newspaper entitled *Executive Health Report.* PHE's sexually explicit speech is sent only to adults, and only upon request.

PHE has taken great care to assure compliance with state and federal obscenity laws. In addition to conduct-

ing rigorous multiple internal review procedures that include review of sexually explicit materials by independent psychologists and sociologists, the company has met with law enforcement officials and sought their advice to ensure that no arguably obscene material is distributed by PHE. PHE has strictly abided by the advice it has received.

Despite these efforts, on August 4, 1986, PHE was indicted in Alamance County, North Carolina for the distribution of videotapes and magazines that had been cleared for distribution by attorneys and law enforcement officials in Orange County, North Carolina (PHE's principal place of business). At trial, a government witness admitted that the materials at issue entered Alamance County only after a law enforcement official obtained a post office box there and requested those materials. After less than an hour of deliberation, the jury acquitted PHE of all charges.

Notwithstanding the jury's verdict in this state prosecution, federal prosecutors in North Carolina and Utah have informed PHE that prosecution of PHE under federal obscenity laws is under serious consideration. PHE has substantial reason to believe that this prosecution will include counts based on the federal RICO statute. In pre-indictment negotiations, federal prosecutors in Utah have insisted that to avoid prosecution on felony charges, PHE must discontinue nationwide sale of any sexually oriented material, even of material protected by the First Amendment. Additionally, PHE's nationwide distribution includes mailings to Indiana that may subject PHE to direct application of Indiana's RICO statute.

In a federal RICO prosecution, PHE's entire business could be forfeited if PHE is found to have distributed two or more vidoeotapes or magazines that were obscene in any community in the United States during the past ten years. Similarly, PHE might be subject to forfeiture under Indiana's RICO statute because it distributed in Indiana two video tapes found obscene under Indiana law. The risk of this draconian forfeiture sanction creates extreme pressure on PHE to accede to the demands of state and federal prosecutors and severely curtail its speech activities in all communities, despite PHE's efforts to ensure that all of the materials it distributes are nonobscene, and thus constitutionally protected.

PHE's experience has made it acutely aware of the threat to free expression posed by application of state and federal RICO statutes to expressive activities. As applied to speech crimes such as obscenity, these statutes—which employ "new weapons of unprecedented scope" in order to eradicate the targets of RICO prosecutions, *Russello v. United States*, 464 U.S. 16, 27 (1983)—are fundamentally at odds with the guarantees of the First Amendment. Many of the constitutional issues raised by petitioner's challenge to the Indiana RICO statute will have a direct bearing on the constitutionality of the federal government's use of the federal RICO Act to regulate obscenity. PHE has a direct and continuing interest in ensuring that both the Indiana RICO statute and its federal counterpart are interpreted and applied consistently with First Amendment guarantees.

PHE wishes to participate in this case to explain the constitutional infirmities of the Indiana RICO statute from the perspective of a national distributor. PHE also wishes to focus on a fundamental question that was squarely raised but not fully addressed in the petition for certiorari, and thus may not be fully considered in the briefs on the merits: the extent to which the First Amendment prohibits forfeiture of a speech establishment's assets based solely on a finding that some past expressive activities of that establishment have violated obscenity laws.

For the foregoing reasons, PHE respectfully urges the Court to accept and file the enclosed brief *amicus curiae.*

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-470

FORT WAYNE BOOKS, INC.,
Petitioner,

v.

STATE OF INDIANA, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF AMICUS CURIAE OF PHE, INC. IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

The interest of PHE is described in the accompanying Motion For Leave To File Brief *Amicus Curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents novel First Amendment questions of surpassing importance. At issue is the constitutionality of the State of Indiana's use of its Racketeer Influenced and Corrupt Organizations Act, Ind. Code § 35-45-6-1 *et seq.* ("RICO"), and the companion Civil Remedies for Racketeering Activity statute, Ind. Code § 34-4-30.5-1 *et seq.* ("CRRA"), to suppress presumptively protected expression. Petitioner challenges this statutory scheme (hereafter referred to as "RICO/CRRA") because it

authorizes the use of draconian weapons against publishers and distributors of expression—including forfeiture of the entirety of the inventory, assets, and income of the speech enterprise—based only on a finding that the publisher or distributor violated state obscenity laws on two occasions.

Indiana's RICO statute makes a criminal and civil offense of "corrupt business influence," which is committed when a person receives proceeds from, maintains an interest in an enterprise through, or is associated with an enterprise engaged in, a "pattern of racketeering activity." Ind. Code § 35-45-6-2. The statute enumerates various predicate offenses, including obscenity violations, which constitute "racketeering activity," and defines a "pattern" as two or more acts of racketeering activity. The companion CRRA statute authorizes a panoply of "remedies" against violators of the "corrupt business influence" provision, including injunctions against continuing to engage in the illegal enterprise or any similar business, orders dissolving the enterprise, license, charter, or permit revocation, and forfeiture. The forfeiture provision authorizes the State to seize for forfeiture "any property used in the course of, intended for use in the course of, derived from, or realized through" a pattern of racketeering activity. *Id.* § 34-4-30.5-3. To obtain a seizure order and to justify a forfeiture, the State need show by only *a preponderance of the evidence* that the property sought to be forfeited was used or intended for use in racketeering activity. *Id.*

The Supreme Court of Indiana acknowledged that "the Indiana RICO statute . . . is essentially patterned after the federal anti-racketeering laws." *4447 Corp. v. Goldsmith*, 504 N.E.2d 559, 560 (Ind. 1987).[1] In *Russello v.*

[1] There are differences between the two schemes, including, for example, that the forfeiture provisions of federal RICO are labeled "criminal penalties" while Indiana labels them "civil remedies," and that forfeiture under federal RICO requires the government to carry a burden of persuasion more stringent than the mere preponderance standard applicable under Indiana's RICO/CRRA.

United States, 464 U.S. 16 (1983), and *United States v. Turkette*, 452 U.S. 576 (1981), this Court surveyed the legislative history of the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, and observed that it creates "unprecedented . . . '[d]rastic' . . . 'extraordinary'" remedies, 464 U.S. at 26-27 (quoting Senators McClellan and Hruska), including forfeiture and broad-ranging injunctions, thought necessary "for an assault upon organized crime and its economic roots." *Id.* at 26. Congress declared, as this Court observed, that "[i]t is the purpose of this Act to seek the *eradication* of organized crime." *Id.* at 27 (emphasis added). The forfeiture provision, in particular, was intended to "'*incapacitate*, and . . . *directly to remove* the corrupting influence from the channels of commerce.'" *Id.* at 28 (emphasis added) (quoting Senator McClellan). As Senator McClellan—sponsor of the federal RICO legislation—made plain, RICO forfeiture was specifically intended to "provide a means of wholesale removal" of offending enterprises and "prevention of their return." 116 Cong. Rec. 18939 (1970).

When the federal RICO statute was originally enacted, obscenity was not included as a predicate offense. Congress believed traditional criminal penalties and procedures had been insufficient to suppress the types of offenses traditionally committed by organized crime. The new "drastic" remedies were designed to succeed where traditional means had failed. *United States v. Turkette*, 452 U.S. at 589. The predicate offenses Congress initially included in the federal RICO legislation were not speech offenses, and their regulation, even with unusually severe sanctions, did not pose any First Amendment problems. Several years later, however, apparently, without any consideration of the First Amendment implications, Congress amended RICO to include obscenity as a predicate offense.

The recent efforts of the federal government and the State of Indiana to redirect RICO away from the regulation of organized crime and non-speech offenses, and toward the regulation of expression by persons who have no connection with organized crime,[2] has created a grave threat to fundamental First Amendment values. When used as a means to regulate obscenity, both Indiana's RICO/CRRA and the federal RICO statute authorize the forfeiture of an entire bookstore and all of its presumptively lawful speech materials based only on a showing that the bookstore sold two books or magazines later determined by a court to be obscene.

The facts of the present case illustrate the threat to First Amendment values posed by the use of RICO sanctions and remedies to regulate expression. In the consolidated cases below, Indiana sought the sealing, seizure, and forfeiture of six bookstores and their contents based solely on allegations that some of the materials that had been sold there, were presently for sale there, and, in the case of a store that had not yet been opened, would one day be offered for sale there, were obscene. 504 N.E.2d at 561-63. In the Indianapolis case, the Supreme Court of Indiana held that RICO/CRRA authorizes the forfeiture of two operating bookstores and a new bookstore that has yet to open on the basis of only four obscene tapes offered for sale at the operating stores. *Id.* at 562.

Seizure and threatened forfeiture on this massive scale raise a host of substantive and procedural issues. There is little question, for example, that these seizures and the *ex parte* orders authorizing them violate well-established

[2] The Attorney General's Commission on Pornography recently concluded that there is little evidence of involvement by "La Cosa Nostra" in the "pornography industry." "Organized crime" may be said to play a role only if it is defined to include "any large and organized enterprise" engaged in violating the obscenity laws. *See* Attorney General's Commission on Pornography, 1 Final Report 291-97 (1986).

First Amendment limitations on pretrial seizures of expressive materials. *E.g., Marcus v. Search Warrant of Property*, 367 U.S. 717 (1961). *Amicus* will not address these procedural questions, but instead urges this Court to focus on the underlying substantive issue this case presents: whether the First Amendment permits massive forfeiture of constitutionally protected expressive materials based only upon past or present violation of obscenity laws. This substantive issue is at the core of the present case because the pretrial seizures were made pursuant to the authority of the RICO/CRRA forfeiture provision, and were undertaken only for the purpose of preserving the seized materials and assets for eventual forfeiture.

Applying the First Amendment standard of review applicable to direct governmental efforts to regulate expression based on the content of the expression, (Point I), *amicus* will demonstrate that use of the forfeiture provisions of RICO/CRRA to regulate obscenity violates the First Amendment. This use of forfeiture constitutes a prior restraint of constitutionally protected expression, (Point II), and, because it is not narrowly tailored to prevent self-censorship, exerts an unconstitutional chilling effect on protected expression, (Point III).

ARGUMENT

I. IMPOSITION OF RICO/CRRA REMEDIES FOR PREDICATE OFFENSES OF OBSCENE SPEECH MUST BE EVALUATED UNDER THE EXACTING FIRST AMENDMENT STANDARD OF REVIEW APPLICABLE TO GOVERNMENT EFFORTS TO REGULATE EXPRESSION BASED ON THE CONTENT OF THAT EXPRESSION.

Indiana's decision to include the crime of obscenity within RICO/CRRA's definition of "racketeering activity" constitutes a direct, affirmative governmental regulation of expression based on the content of that expres-

sion. This use of RICO sanctions and remedies must meet the exacting First Amendment tests applicable when government regulates expression "because the communication . . . is itself thought to be harmful." *United States v. O'Brien*, 391 U.S. 367, 382 (1968). *Accord Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976); *Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974). *See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1496-1502 (1975). As this Court made clear in *Arcara v. Cloud Books, Inc.*, "least restrictive means" scrutiny applies when "a significant expressive element drew the legal remedy in the first place." 478 U.S. 697, ——, 92 L. Ed. 2d 568, 578 (1986). *See also Speiser v. Randall*, 357 U.S. 513, 520 (1958). Regulation of obscenity through RICO must thus be subject to at least the same scrutiny as is applied to other government efforts to regulate obscenity. Like all other "statutes designed to regulate obscene materials," RICO "must be carefully limited" to minimize the "inherent dangers" of censoring, or causing self-censorship of, constitutionally protected, nonobscene expression. *Miller v. California*, 413 U.S. 15, 23-24 (1973). *Accord Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) (obscenity regulation must "conform to procedures that will ensure against the curtailment of constitutionally protected expression").

The Supreme Court of Indiana made no effort to ascertain whether Indiana's use of RICO/CRRA remedies to "eradicate" and "incapacitate" speech enterprises was "carefully limited" to protect against the censorship and self-censorship of protected expression. This failure alone warrants reversal. Instead, believing that RICO/CRRA was not designed to regulate expression at all, the court applied the deferential standard of review applicable to regulations that serve governmental interests unrelated to the suppression of expression and impose at most in-

cidental burdens on expression. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (deferential review of application of nuisance abatement law to bookstore when abatement was based on non-speech ground that prostitution occurred on premises); *see also United States v. Albertini*, 472 U.S. 675, 687-688 (1985); *United States v. O'Brien*, 391 U.S. at 377. RICO/CRRA, as the Indiana court would have it, is not a government effort to "restrain the sale or distribution of expressive materials" because the statute aims to regulate "racketeering," not obscenity *per se*. 504 N.E.2d at 564.

The state court's analysis, however, obscures RICO/CRRA's true nature. In *Near v. Minnesota*, this Court rejected an indistinguishable semantic maneuver intended to avoid First Amendment constraints. Attempting to justify the application of a nuisance abatement law to enjoin a newspaper from future libelous publication on the basis of a finding of past libel, the State in *Near* had argued that it was merely regulating a business causing a public nuisance. "Characterizing the publication as a business and the business as a nuisance," the Court held, "does not permit an invasion of the constitutional immunity against restraint." 283 U.S. 697, 720 (1931). Similarly, the Supreme Court of Indiana's efforts to characterize expression as "racketeering activity" and racketeering activity as a felony cannot suffice to exempt Indiana's RICO statute from strict First Amendment scrutiny. When the State uses RICO/CRRA to regulate expression, the statute must pass muster under First Amendment standards applicable to all direct government efforts to regulate expression.[3]

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[3] As explained in *Schad v. Borough of Mt. Ephraim*, "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." 452 U.S. 61, 68 (1981) (zoning law prohibiting "live entertainment," including nude dancing, subject to strict scrutiny). *Accord Vance v. Universal Amusement Co.*, 445

Applying the proper First Amendment standard of review, *amicus* will demonstrate that when based on the predicate offense of obscenity, the forfeiture provisions of RICO/CRRA violate the First Amendment for two reasons. *First*, in such cases, the forfeiture and accompanying injunctive provisions constitute an unconstitutional prior restraint on expression. *Second*, these provisions are not narrowly tailored to prevent self-censorship, and thus exert an unconstitutional chilling effect on protected expression.

II. WHEN APPLIED IN CASES INVOLVING PREDICATE ACTS OF OBSCENE SPEECH, THE FORFEITURE AND INJUNCTIVE PROVISIONS OF RICO/CRRA AUTHORIZE UNCONSTITUTIONAL PRIOR RESTRAINTS ON EXPRESSION.

The Supreme Court of Indiana avoided the conclusion that RICO/CRRA authorizes an unlawful prior restraint, but only by positing a justification inconsistent with the statute's terms and its acknowledged effect. The face of the statute and the State's actions taken pursuant to it plainly demonstrate that the court below was wrong in asserting that forfeiture under RICO/CRRA "is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity." *4447 Corp. v. Goldsmith*, 504 N.E. 2d at 565. In the cases below, the State sought the sealing, seizure, and forfeiture of six bookstores and their contents based solely upon allegations that some of

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U.S. 308 (1980) (per curiam) (nuisance abatement law subject to strict scrutiny when applied to regulate expression); *Near v. Minnesota*, 283 U.S. 697 (1931) (same); *Marcus v. Search Warrant of Property*, 367 U.S. 717, 730 (1961) ("The Missouri Supreme Court's assimilation of obscene literature to gambling paraphernalia or other contraband for purposes of search and seizure does not . . . answer the appellant's constitutional claim, but merely restates the issue whether obscenity may be treated in the same way"). *See also Arcara v. Cloud Books, Inc.*, 478 U.S. at ——, 92 L.Ed.2d at 569 (O.Connor, J., concurring).

the materials that had been sold there, were presently for sale there, and, in the case of the store that had not yet been opened, would one day be offered for sale there, were obscene. *Id.* at 561-63.[4] No proof was offered (or required by the statute) that the stores and their entire contents constituted the "ill-gotten gains" of obscenity violations or any other "racketeering" activity.[5] To the contrary, as the Indiana court recognized, to obtain forfeiture of a bookstore under RICO/CRRA, the State must prove only that the store was used or intended for use in committing the crime of obscenity. *Id.* at 561 ("Upon a showing by a preponderance of the evidence that the property in question was so used, the court shall order the property forfeited to the state"). *See* Ind. Code § 34-4-30.5-3(a). In fact, in the Indianapolis case, the Indiana court indicated RICO/CRRA would authorize the forfeiture of two operating bookstores and a new bookstore that had yet to open on the basis of only four obscene tapes offered for sale at the operating stores. *Id.* at 562. Such a massive forfeiture could not be justified on the ground that all of the inventory of those bookstores had been acquired with the "ill-gotten gains" from the sales of four obscene tapes. On the facts of this case, forfeiture under RICO/CRRA could be based only on the theory—recognized by the Indiana court—that the stores and inventory were "used in the course of," or "intended for the use in the course of," obscenity violations.

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[4] There is no allegation in this case that all or most of the materials for sale in these stores was obscene. To the contrary, in the Indianapolis case the State alleged only four videotapes to be obscene, and in the Fort Wayne case, none of the current inventory was alleged to be obscene; the State relied exclusively on the fact of prior obscenity convictions. Until proved by the State to be obscene, of course, speech is presumptively constitutionally protected. *See Freedman v. Maryland*, 380 U.S. 51, 58 (1965). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975).

[5] No "racketeering" activity other than obscenity violations was ever alleged.

Nor can the rationale of disgorgement of ill-gotten gains explain or justify the other remedies authorized by CRRA, such as, for example, license revocation, corporate charter revocation, *see 4447 Corp. v. Goldsmith*, 479 N.E. 2d 578, 582 (Ct. App. Ind. 1985) (State sought these remedies in the instant case), or an injunction "prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged" in violation of RICO. Ind. Code § 34-4-30.5-2(2).[6] Such remedies, like "use" or "intended use" based forfeiture, are obviously forward-looking, and have nothing to do with disgorgement.

The Indiana RICO/CRRA, like the federal RICO statute, thus has far more ambitious and "far-reaching" objectives than disgorgement of illegal profits.[7] *Russello v. United States*, 464 U.S. at 27. Indiana's RICO remedies are sweeping—authorizing the seizure and forfeiture of anything used or *intended* for use in a violation, and authorizing license and charter revocation and broad injunctions against similar conduct in the future—because, like the federal RICO statute, RICO/CRRA is designed in substantial part to prevent enterprises that have violated "racketeering" laws from doing so ever again—to *incapacitate* them. As the statutory text and legislative history make clear, the federal RICO statute is meant to put the enterprise out of business once and for all, and to prevent its reappearance in another form, by forfeiting not only the proceeds of illegal activity, but also any

[6] The federal RICO statute authorizes a similar injunctive remedy. 18 U.S.C. § 1964(a).

[7] If, however, the statute's intent *were* limited to disgorgement of assets acquired unlawfully, the statute would be grossly overbroad, because neither by its terms nor by its effect is it limited to disgorgement of such assets. Instead, the statute applies, as here, to a substantial amount of presumptively protected speech material —and the proceeds of the sale of such material—that have not in any sense been shown to have been acquired through racketeering activity.

property affording a "source of influence" over the "racketeering" activity, 18 U.S.C. § 1963(a)(2), and any interest the defendant has in the "enterprise" that violated the law, 18 U.S.C. § 1963(a)(1); and by authorizing injunctions against the defendant's "engaging in the same type of endeavor as the enterprise engaged in," 18 U.S.C. § 1964(a). The Indiana law has the same effect, authorizes the same drastic remedies, and has the same "far-reaching" objective. Applied wholesale in the obscenity context, RICO/CRRA prevents a speech enterprise—a bookstore, theater, etc.—from committing further obscenity violations by preventing it from speaking at all.

This purpose and effect of federal RICO was expressly recognized in the Meese Commission's Report on Pornography, which urged prosecutors to use forfeiture to "literally put many pornographers out of business." Attorney General's Commission on Pornography, 1 Final Report 464 (1986). The Commission observed that "RICO provides an effective means to substantially eliminate obscenity businesses." *Id.* at 498.[8]

Such incapacitation of a speech enterprise based upon past obscenity violations is a classic prior restraint prohibited by the First Amendment. Although for non-speech offenses incapacitation of an offending business poses few constitutional difficulties, incapacitation because of speech offenses is fundamentally different. Unlike laws dealing with non-speech crimes such as gambling or extortion, statutes regulating obscenity must be carefully drawn "to avoid suppression of constitutionally protected publications." *Marcus v. Search Warrant of Property*, 367 U.S. at 730-731. In *Near v. Minnesota*, 283 U.S. 697, this Court condemned a scheme under which Min-

[8] Press reports indicate that law enforcement officials in Florida have already successfully used that State's RICO statute to close down bookstores because of their expressive activity. Wall St. J., Aug. 25, 1987, at 25.

nesota "empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive." *Kingsley Books, Inc v. Brown*, 354 U.S. 436, 445 (1957). As the Eleventh Circuit has observed, "[i]n *Near* the Supreme Court condemned prior restraints prohibiting future expression that may fall within the purview of the First Amendment where such restraint is based only on a finding of unprotected present conduct." *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550, 1551 (1983) (mem.) (affirming on the basis of district court's opinion). Such a restraint on future speech based upon a finding that past speech was unprotected is " 'the essence of censorship.' " *Kingsley Books*, 354 U.S. at 445 (quoting *Near*, 283 U.S. at 713).

Near presented a statutory scheme strikingly similar to that at issue here. The "reason for the enactment" struck down in *Near* was Minnesota's determination that traditional "prosecutions to enforce penal statutes for libel do not result in 'efficient repression or suppression' " of libelous speech. 283 U.S. at 711. Similarly, as noted, the reason for the enactment of RICO statutes was Congress' determination, adopted by the State of Indiana, that activities denominated "racketeering," later defined as including obscenity, could not be sufficiently repressed or suppressed by traditional prosecutions and other "remedies available to the government." *Turkette*, 452 U.S. at 589. In *Near*, Minnesota had decided that instead of prosecuting individual criminal libels as they occurred, it would authorize abatement of the "business" or economic base from which those libels had emanated. 283 U.S. at 717.[9] This, of course, is precisely the operation and effect of the RICO/CRRA remedies of forfeiture, revocation, and injunction in the obscenity context: eradicating the

[9] Minnesota's nuisance abatement statute applied to obscenity as well as to "malicious, scandalous and defamatory" publications. 283 U.S. at 702.

enterprise from which the obscenity violations emanated. Because, as in *Near*, RICO statutes as applied to speech shut down speech enterprises solely because they engaged in unlawful speech in the past, they are plainly unconstitutional.

Although the predicate for imposing the restraint is the same under RICO/CRRA as it was in *Near*—commission by the defendant business of prior speech offenses—the restraint authorized is even more inimical to First Amendment values than was the restraint in *Near*. At issue in *Near* was an injunction that restrained defendants only from publishing "a malicious, scandalous or defamatory newspaper, as defined by law." 283 U.S. at 706. The *Near* Court struck down this injunction even though it permitted the publisher to publish a newspaper that did not contain libelous material. *Id.* at 712-13. RICO/CRRA, however, authorizes seizure and forfeiture of all the expressive materials owned by the enterprise, as well as all other property and assets of the business. Such physical seizure of expressive materials is "more repressive than an injunction preventing further sale." *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964) (plurality opinion). As this Court has ruled, seizure is "an effective restraint—indeed the *most* effective restraint possible— . . . because all copies on which the police could lay their hands were physically removed from the newsstands and from the wholesale distributor." *Marcus v. Search Warrant of Property*, 367 U.S. at 736 (emphasis added). RICO/CRRA, of course, goes still further: it authorizes the seizure and forfeiture of the means of obtaining or selling any *other* expressive materials. Furthermore, RICO/CRRA authorizes the court to enter an injunction broader by far than that struck down in *Near*, prohibiting the defendant from ever again operating an adult bookstore.[10]

[10] The remedies authorized by RICO/CRRA clearly pose the dangers of prior restraints identified by Justice White in his dissent in

Forfeiture and the other remedies authorized by RICO/CRRA are merely more repressive versions of numerous other forms of prior restraint attempted against adult bookstores over the years. States and municipalities have attempted to impose prior restraints by authorizing the padlocking of adult bookstores shown to have violated the obscenity laws;[11] by authorizing revocation of the business licenses of adult bookstores on the basis of obscenity violations;[12] and by authorizing nuisance abatement through injunctive remedies.[13] These remedies, each authorized by RICO/CRRA and each less oppressive than the combined remedies here at issue, have been struck down in virtually every case in which they were predicated on past obscenity violations.

The nuisance abatement remedy upheld in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, was fundamentally different from that at issue here both in its impact on constitutionally protected speech and in the predicate for imposing the remedy. Distinguishing *Near*, the *Arcara* Court observed that the forfeiture order there merely

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Vance v. Universal Amusement Co., 445 U.S. at 324: "through caprice, mistake, or purpose, the censor may forbid speech which is constitutionally protected." RICO/CRRA restrains *all* speech by the defendant, whether constitutionally protected or not.

[11] *E.g., Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 1022 (1981); *Universal Amusement Co. v. Vance*, 587 F.2d 159 (5th Cir. 1978), *aff'd on other grounds*, 445 U.S. 308 (1980) (per curiam); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *General Corp. v. State*, 294 Ala. 657, 320 So.2d 668 (1975), *cert. denied*, 425 U.S. 904 (1976); *People v. Projection Room Theater*, 17 Cal. 3d 42, 130 Cal. Rptr. 328, 550 P.2d 600, *cert. denied*, 429 U.S. 922 (1976).

[12] *E[illegible] Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980).

[13] *E.g., Vance v. Universal Amusement Co.*, 445 U.S. 308; *Near v. Minnesota*, 283 U.S. 697.

closed the premises where unlawful sexual *conduct* was taking place; it imposed "no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another location." 92 L. Ed. at 577, n.2. RICO/CRRA, in contrast, like the unconstitutional schemes in *Marcus*, 367 U.S. 717, and *A Quantity of Copies of Books*, 378 U.S. 205, imposes the "most effective restraint possible" on the dissemination of particular materials—all expressive materials on the premises are seized. Moreover, RICO/CRRA is designed to deprive the defendant of the economic capacity to continue his business or open a new one, and even authorizes an injunction against the defendant's opening a new adult bookstore.

Even more important, the *Arcara* Court emphasized that "the imposition of the closure order" in that case had "nothing to do with any expressive conduct at all." 92 L. Ed. 2d at 577, n.2. The bookstore was closed as a public health measure to prevent continued prostitution and other *non-speech* activity on the premises. In the Court's view, the fact that expressive materials were involved was a coincidence, and the impact on speech activities was only incidental. It was implicit in the Court's analysis, as Justice O'Connor observed, that use of a nuisance statute to "clos[e] down a book store because it sold indecent books . . . would clearly implicate First Amendment concerns." *Id.* at 579. Unlike the closure at issue in *Arcara*, RICO/CRRA is unconstitutional as applied to expressive activity because it authorizes complete eradication of a speech enterprise based solely upon a finding that the enterprise has engaged in instances of obscene speech in the past. While the application of this ordinance in *Arcara* "differ[ed] from a prior restraint," *id.* at 577, n.2, this case presents a prior restraint in its most virulent form.

None of the rationales offered on behalf of RICO forfeiture and CRRA's accompanying remedies in the ob-

scenity context can justify the prior restraint they impose. It is a further constitutional shortcoming of RICO/CRRA forfeiture, not a saving feature, for example, that it restrains *all* future speech by the defendant enterprise, not only that speech which the State believes will be obscene. A broad, so-called "content neutral" restraint on speech, triggered by some past unprotected speech offense, is just as unlawful as a content-based restraint aimed only at future unlawful speech. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). The reason a narrow, content-based ban such as that condemned in *Near* is not permitted is that the State cannot presume in advance that future speech will be unprotected. Where the State knows in advance that much of the speech restrained will be lawful, its sweeping ban is doubly unconstitutional, and many times more dangerous.[14]

Nor can the RICO/CRRA remedies of forfeiture and injunction be upheld as "criminal penalties," rather than prior restraints. *See, e.g., Western Business Systems, Inc. v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980). First, the remedies of forfeiture, revocation, and injunction, like nuisance abatement in *Near*, are expressly "civil remedies" under Indiana law, and are authorized by the Civil Remedies for Racketeering Activity Act. *See* 4477

[14] Similarly, RICO/CRRA forfeiture cannot be justified as authorizing only the seizure and destruction of publications found after a trial to have been obscene, *Kingsley Books, Inc.*, 354 U.S. 436, because it authorizes forfeiture of materials that have not been found obscene. Nor, as noted, can it be argued that forfeiture is justified as requiring only the disgorgement of the fruits of illegal activity. See, in addition to the Supreme Court of Indiana's opinion in the present cases, *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987) (purporting to limit federal RICO forfeiture to disgorgement of ill-gotten gains). Materials proved to be obscene and the profits therefrom almost invariably constitute a minute percentage of the materials and assets forfeited under RICO, as in the cases before the Court.

Corp. v. Goldsmith, 504 N.E.2d at 561. In addition, those remedies can be invoked if a "violation" of the obscenity laws is found by a *preponderance of the evidence*, and if it is shown by a preponderance of the evidence that the property in question was "used" or "intended for use in the course of" an obscenity violation. *Id.*

Furthermore, even a prior restraint imposed as a *criminal* penalty, as in the federal RICO statute, would remain a prior restraint. "[T]he standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed. *Schad v. Borough of Mt. Ephraim*, 452 U.S. at 68. The relevant fact is that future speech would be restrained based on a finding of past unprotected speech, not that criminal rather than civil power is invoked to accomplish the restraint. In the prior restraint context, in particular, "the court has regard to substance and not to mere matters of form, and . . . [a] statute must be tested by its operation and effect." *Near v. Minnesota*, 283 U.S. at 708. *Accord Speiser v. Randall*, 357 U.S. at 520. Because the effect —and manifest purpose—of federal RICO, when based on predicate obscenity offenses, is to impose a prior restraint, it, too, is unconstitutional, despite the "criminal penalty" label attached by Congress.

A similar "criminal penalty" argument was raised and rejected in *Near*. The *Near* Court, looking to the substance of the statute, recognized that its object was "not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical." 283 U.S. at 710. To hold, in effect, that Indiana could constitutionally eradicate speech enterprises simply by adopting a new statute characterizing the RICO/CRRA forfeiture, revocation, and injunction provisions as "criminal penalties," would destroy prior restraint doctrine, the centerpiece of First Amendment jurisprudence. Such a ruling would validate *any* prior restraint if it were accomplished as "punish-

ment" imposed after a criminal trial: this Court's rulings in *Near* and *Vance*, for example, could be evaded by the expedient of changing the label under which the injunctions in those cases were imposed. Moreover, legislatures and municipal governments would be free to enact "banning orders" as punishment for speech-related crimes. An individual convicted of burning his draft card, as in *United States v. O'Brien*, 391 U.S. 367 (1968), or an individual convicted of violating an injunction against street demonstrations, as in *Walker v. City of Birmingham*, 388 U.S. 307 (1967), could be banned from participating in *any* future political demonstration as "criminal punishment."

Such results are inconceivable, and the prior restraints at issue in this case are similarly unconstitutional regardless of the labels used to impose them or their purported rationale. However denominated, the State may not constitutionally impose a far-reaching ban on future speech predicated on past objectionable speech activity.[15]

Finally, it is immaterial to the present case that incarceration, which can undoubtedly be imposed as a punishment for violation of obscenity laws, has an incidental impact on speech rights. *See Arcara v. Cloud Books, Inc.*, 92 L. Ed. 2d at 577. Imprisonment is a traditional punishment, *see Kingsley Books, Inc.*, 354 U.S. at 444, imposed for violation of numerous criminal laws to accomplish several well-recognized purposes, such as deter-

[15] In many cases, courts have rejected the contention that prior conviction justifies the deprivation by the State of any First Amendment liberty (other than the right to vote, the deprivation of which is expressly authorized in the Fourteenth Amendment). *See, e.g., Genusa v. City of Peoria*, 619 F.2d 1203, 1219 (7th Cir. 1980); *Avon 42nd Street Corp. v. Myerson*, 352 F. Supp. 994 (S.D.N.Y. 1972); *Perrine v. Municipal Court*, 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971), *cert. denied*, 404 U.S. 1038 (1972); *City of Delavan v. Thomas*, 31 Ill. App. 3d 630, 334 N.E.2d 190 (1975); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370 (1975); *Seattle v. Bittner*, 81 Wash. 2d 747, 505 P.2d 126 (1973).

rence and rehabilitation, that are wholly unrelated to imposing a prior restraint on or otherwise suppressing speech. Any hypothetical restraint incarceration might impose on expression is therefore incidental to its primary functions. Moreover, the incidental restraint on speech imposed by imprisonment is limited; the First Amendment ensures that consistent with the penological institution's legitimate non-speech objectives "reasonable and effective means of communication remain open" to prisoners. *Pell v. Procunier*, 417 U.S. 817, 826 (1974); *see also Jones v. North Carolina Prisoners' Union*, 443 U.S. 119 (1977). In contrast, the restraints imposed by RICO/CRRA are neither incidental nor limited. They are "weapons of unprecedented scope," "drastic methods," *Russello v. United States*, 464 U.S. at 26, that are specifically intended in the obscenity context to eradicate the speech enterprise and prevent future speech activities. Accordingly, they are plainly unconstitutional when predicated on speech crimes.

III. AS APPLIED TO PREDICATE ACTS OF OBSCENE SPEECH, RICO/CRRA'S FORFEITURE PROVISIONS VIOLATE THE FIRST AMENDMENT BECAUSE THEY ARE NOT NARROWLY TAILORED TO PREVENT THE SELF-CENSORSHIP OF CONSTITUTIONALLY PROTECTED EXPRESSION.

Although the First Amendment does not protect obscene expression, *Roth v. United States*, 354 U.S. 476 (1957), only a small portion of sexually oriented expression falls within the narrow category of unprotected obscenity set forth in *Miller v. California*, 413 U.S. 15 (1973). *Miller* defined obscenity as expression that: (1) taken as a whole, appeals to the prurient or "morbid" interest in sex, *id.* at 24; *see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985); (2) describes specific hard-core sexual conduct in a patently offensive way, *Miller*, 413 U.S. at 24; and (3) taken as a whole, lacks "serious literary, artistic, political, or scientific

value." *Id.* As this Court's careful delimitation of unprotected obscenity makes clear, "[s]ex and obscenity are not synonymous." *Roth*, 354 U.S. at 487. Rather,

> "[s]ex, a great and mysterious motive in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."

Id. All sexually oriented expression that is not obscene receives full constitutional protection, *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 208-211 (1975); *Jenkins v. Georgia*, 418 U.S. 153 (1974), whether presented as science, art, or entertainment. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). This protection extends to the distribution as well as the publication of such expression. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58.

This Court has repeatedly stressed that because "the line between speech unconditionally guaranteed and speech which legitimately may be regulated, suppressed or punished, is finely drawn[,] . . . [t]he separation of legitimate from illegimate calls for . . . sensitive tools." *Speiser v. Randall*, 357 U.S. at 525. Thus, as with all government efforts to prohibit unprotected expression, "statutes designed to regulate obscene material must be carefully limited." *Miller*, 413 U.S. at 24. When seeking to restrict the dissemination of unprotected obscenity, government "is not free to adopt whatever procedures it pleases . . . without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant of Property*, 367 U.S. at 731; *Smith v. California*, 361 U.S. 147, 152 (1959). The RICO statute at issue here—like all government regulation of obscenity—must be drawn to ensure that the regulation neither directly prohibits nor indirectly deters protected expression. Because First Amendment freedoms are "delicate and vulnerable," a "threat of sanctions may deter their exercise almost as potently as the actual application of

sanctions." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

Whether a particular regulation will cause an unconsitutional "chill" or self-censorship of protected expression depends upon several considerations, including:

> (i) the precision and scope of the proscription of expression, *e.g.*, *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (regulation "must aim specifically at evils within the allowable area of state control");
>
> (ii) the burdens the regulation imposes on those seeking to disseminate expression, *e.g.*, *Smith v. California*, 361 U.S. at 151-155 (discussing need for scienter requirement in obscenity cases to prevent self-censorship by booksellers);
>
> (iii) the nature of the procedures used to determine whether the regulation has been transgressed, *e.g.*, *Speiser v. Randall*, 357 U.S. at 526 (forbidding allocation to speaker of burden of proof that allegedly unlawful expression was constitutionally protected); and
>
> (iv) the severity of the consequences imposed on the transgressor, *e.g.*, *New York v. Ferber*, 458 U.S. 747, 774 (1982) (recognizing "that the penalty to be imposed is relevant" to chilling effect analysis).

See generally, Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11, 24-27 (1981); Schauer, *Fear, Risk And The First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. Rev. 685 (1978).

The principles developed in these cases require facial invalidation of Indiana's use of RICO remedies to regulate obscenity. Indiana's RICO/CRRA statute is certain to chill a vast amount of constitutionally protected expression because the statute incorporates a vague and uncertain substantive standard, employs plainly inadequate procedures, and threatens devastating consequences.

This Court has long acknowledged the intractable difficulty of establishing a workable definition of unprotected "obscenity." *See, e.g., Miller*, 413 U.S. at 27-28. At best, "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 66. Members of the Court have even expressed some dissatisfaction within the "line" drawn in *Miller*. *See, e.g., Pope v. Illinois*, —— U.S. ——, 107 S.Ct. 1918, 1923, 95 L. Ed. 2d 439 (1987) (Scalia, J., concurring) (suggesting "reexamination of *Miller*"); *Smith v. United States*, 431 U.S. 291, 316 (1977) (Stevens, J., dissenting); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting).[16] One commentator has observed:

> "The 'inevitably obscure' standards which define obscenity do more than simply raise the level of uncertainty in an individual's own mind as to the lawfulness of the contemplated conduct. In addition, these standards, and the difficulty of their application by judge or juror, increase the likelihood of error in the litigation process itself."

Schauer, 58 B.U.L. Rev. at 717. This uncertainty and risk of error necessarily engender self-censorship of constitutionally protected speech, although to a degree thought tolerable when sanctions are limited and may be imposed only upon criminal conviction.

Indiana's use of RICO/CRRA to regulate obscenity intolerably exacerbates the risks to freedom of expression that inhere in the intractably vague substantive definition of obscenity. *First*, the RICO statute imposes consequences so devastating that they are certain to cause would-be speakers "to steer far wider of the [uncertain

[16] At least one state supreme court has invoked state constitutional grounds to invalidate a statute embodying the *Miller* test because "such an indeterminate test is intolerable." *State v. Henry*, 302 Or. 510, 732 P.2d 9, 10 (1987).

but] unlawful zone." *Speiser v. Randall*, 357 U.S. at 526. *Second*, RICO/CRRA authorizes these devastating sanctions upon a mere showing by "a preponderance of the evidence" that a defendant transgressed this "dim and uncertain line." The chilling effect of the unprecedented severity of the forfeiture sanctions and this minimal burden of proof, when coupled with the inherently vague substantive definition of obscenity, violates the First Amendment.

1. *Severity of Sanction.* It is axiomatic that the deterrent effect of a government sanction will increase as the sanction becomes more severe. Erlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. Legal Stud. 259 (1972): R. Posner, *Economic Analysis of Law* 165 (1977). This is equally true when the sanction is imposed for violation of a law regulating expression. Commentators have recognized that "the risk of self-censorship is likely to be compounded by the potential severity of the sanctions that can be imposed against speakers." Blasi, *supra*, 66 Minn. L. Rev. at 26. *Accord* Schauer, *supra*. In *New York v. Ferber*, this Court acknowledged this reality when it specifically directed that the severity of the consequences for violating a regulation of sexual expression be considered in evaluating the chilling effect of that regulation. 458 U.S. at 774. This Court has also taken account of the chilling effect of draconian sanctions for unprotected expression in analogous contexts. In *Gertz v. Robert Welch, Inc.*, for example, the Court held that because the threat of huge punitive damage awards in defamation cases chills protected expression, the availability of punitive damages must be limited to cases (other than those of purely private concern) in which a plaintiff can prove with convincing clarity that a defendant acted with "actual malice." 418 U.S. 323 (1974). *Cf. Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) (arguing that only "the most nominal punishment"

could constitutionally be inflicted for the alleged speech crime at issue).

Lower courts have also recognized the importance of severity of punishment in gauging the chilling effect of laws regulating expression. In *State of CMH Enterprises*, No. CM87-1781A7 (10th Judicial Cir., Fla., Jan. 8, 1988) (copies lodged with the clerk), for example, a state circuit court invalidated that State's RICO statute as applied to the predicate offense of obscenity because the statute authorized a thirty-year jail term. Given the unprecedented severity of the sentence, the court found, "few individuals will be willing to accept the extreme penalty for a wrong guess." Op. at 13. *See also Polykoff v. Collins*, 816 F.2d 1326, 1340 (9th Cir. 1987) (recognizing that excessive penalties will chill exercise of First Amendment rights).

RICO statutes exert a chilling effect that truly overwhelms any chill ever before considered in the First Amendment context. Indiana's statute specifically authorizes the forfeiture of "any property used in the course of, intended for use in the course of, derived from, or realized through" obscene speech. Ind. Code § 34-4-30.5-3. Forfeiture on this scale is, as the Supreme Court of Indiana acknowledged, a government "weapon[] of unprecedented scope." 504 N.E.2d at 564 (quotation omitted). As the facts of this case demonstrate, this statute authorizes the seizure and forfeiture of the entire contents of a bookstore—including both expressive materials and essentials such as shelving—and all assets owned or controlled by the bookstore or its owner. Under RICO/CRRA two isolated examples of expression found to be obscene in any community in Indiana poison all proceeds derived from the sale not only of *those* unlawful materials, but also of all constitutionally protected materials, and all assets of a corporation that publishes or distributes such materials. As was plainly intended by the architects of RICO/CRRA, any business that risks

two obscenity convictions is risking a corporate death penalty.

Thus, if a nationwide film distributor such as Loews Incorporated exhibited the critically acclaimed but "X" rated motion picture "Last Tango in Paris" in theaters in Indiana and received revenues therefrom, and if two exhibitions of the film were held to violate Indiana's obscenity laws, then RICO/CRRA's forfeiture provision would authorize the State to seize all assets of the distributor within the State's jurisdictional reach. Similarly, if a magazine distributor distributed *Penthouse* magazine in Indiana, and were prosecuted for two issues (or even two copies of a single issue) found to be obscene anywhere in Indiana, the entire stock and assets of the distributor—including not only *Time*, *Newsweek*, and its other magazine inventory, but also its vehicles and storage areas—would be forfeited to the State. Or if a college bookstore were prosecuted for sale of two copies of Henry Miller's *Tropic of Capricorn* in a community in which that book was found to be obscene, the bookstore's assets (and perhaps the college's assets) would be forfeited in their entirety.

Confronted with a threat of this magnitude, any rational film exhibitor, magazine distributor, or bookstore owner will be forced to avoid the "dim and uncertain" line marking the danger zone by self-censoring virtually all sexually explicit expression. To do less would be to risk the entirety of one's business. Because the expression thus self-censored is presumptively protected under the First Amendment, and the vast majority of such expression would doubtless not be found obscene, the severity of RICO/CRRA's forfeiture provision exerts an unconstitutional chilling effect.

2. *Inadequacy of Procedures.* Indiana's RICO forfeiture provision is constitutionally deficient in a second crucial way. It authorizes forfeiture of the magnitude just described based on a showing by a mere preponder-

ance of the evidence that a defendant "violated" Indiana's obscenity law. Ind. Code § 34-4-30.5-3. Especially in light of the inherent ambiguity of the underlying definition of obscenity and the extraordinarily severe consequences attending violation of RICO/CRRA, the "preponderance of the evidence" standard is plainly inadequate to protect the First Amendment interests at stake. *Smith v. California*, 361 U.S. 147; *Speiser v. Randall*, 357 U.S. 513.[17]

In *Speiser*, this Court explained that when a State seeks to demonstrate the unlawfulness of expression "the procedures by which the facts of the case was adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford." 357 U.S. at 521. The burden of proof, the Court went on to note, "may be decisive of the outcome," *id.* at 525, because it allocates the risk of error between the parties:

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcendent value . . . this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.
>
> "[W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that legitimate utterance will be penalized. . . . This is especially to be feared when the complexity of the proofs and the generality of the standards applied . . . provide but shifting sands on which the litigant must maintain his position."

Id. at 525-526. If allocation of the burden of proof creates a significant risk that a defendant will erroneously be found to have engaged in unprotected expression, *Speiser* concluded, then this risk will chill protected expression. *See generally*, Schauer, *supra*, 58 B.U.L. Rev. at 704 ("By choosing rules that minimize the risk of an erroneous judgment, we lessen the fear generated by that risk, and thereby reduce the extent to which people are deterred from engaging in protected speech-related activity. This is the essence of the chilling effect doctrine."). *Accord Smith v. California*, 361 U.S. at 150-151.

Because it allocates the risk of error virtually evenly between the State and the defendant, the mere "preponderance" standard established for forfeiture by RICO/CRRA does not accord sufficient respect to the transcendent First Amendment interests at stake in RICO proceedings predicated on obscenity charges. To impose criminal penalties such as fines and imprisonment for obscenity violations, penalties that are less severe than the forfeiture authorized by RICO/CRRA, the State must meet the "reasonable doubt" standard, designed to resolve the risk of error and uncertainty almost invariably in the defendant's favor. *See In re Winship*, 397 U.S. 358 (1970). But to effect a forfeiture of all assets of a speech enterprise, the State must meet a far more lenient burden of proof, a burden that imposes upon the defendant a far greater risk of error. With the stakes so high—for the speech enterprise and for First Amendment values—this risk is intolerable.

The inherently vague definition of obscenity, the devastating consequences of two "violations" of the obscenity law, and the inadequacy of the procedural protections af-

[17] This Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), is not to the contrary. In *Sedima* this Court specifically reserved the issue of the proper standard of proof for *civil* RICO cases, *id.* at 491, and, more importantly, this Court was not even remotely considering what burden of proof is required by the First Amendment when government seeks massive forfeiture of a speech enterprise based on a finding of past obscenity violation.

forded defendants under Indiana's RICO/CRRA statute, each impose a chilling effect arguably sufficient to invalidate the statute. Cumulatively, the chilling effect is staggering. The would-be speaker must confront not only the difficulty of distinguishing protected from unlawful expression, but also the high risk of erroneous adjudication under the mere "preponderance" standard and the daunting risk of draconian consequences if the speaker guesses wrong or the tribunal errs. A substantial amount of constitutionally protected expression will certainly be deterred by this regulatory scheme. For this reason, as well as those set forth in Point II, *supra*, Indiana's RICO/CRRA forfeiture provision is unconstitutional when applied to predicate offenses of obscenity.

CONCLUSION

The judgment of the Supreme Court of Indiana should be reversed.

Respectfully submitted,

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No. 87-470

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

v.

STATE OF INDIANA, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Indiana

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF VIDEO SOFTWARE DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Video Software Dealers Association (VSDA) hereby respectfully requests leave to file the accompanying Brief Amicus Curiae in support of petitioner in the above-captioned case.[1] Petitioner has consented to VSDA's participation but the Respondents have not. Since VSDA believes that the result of this case can have a profound impact on the First Amendment rights of its members and their customers, it regrets that Respondents' action requires VSDA to request leave of the Court to file the attached Brief.

VSDA is the primary national trade association of entities renting, selling and distributing prerecorded video programming to the public. VSDA is composed of over 3,000 regular members, representing 15,000 to

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[1] This case has been consolidated with *Sappenfield v. State of Indiana*, No. 87-614. VSDA is not seeking leave to participate in the *Sappenfield* case.

20,000 of the approximately 25,000 retail video outlets in the United States. VSDA also serves as the representative of the majority of the nation's distributors of prerecorded video material and has as associate members the major motion picture companies, independent video producers and manufacturers of various products related to the video industry.

The sale and rental of video cassettes for home viewing is a rapidly growing industry that is serving ever increasing numbers of the public. The number of homes with video cassette recorders has soared from only 2.7 percent of the nation's television households in 1980 to 49.7 percent in 1987. Nationwide, an average of 75 million films are rented each week.[2] This tremendous expansion in the number of video cassette recorders and in the number of video cassettes rented or sold establishes video cassette use as a highly desirable and socially prevalent medium of expression. It is one that, like books and magazines, gives individual consumers the freedom to choose what they will view in the privacy of their homes.

There are over 17,000 titles available in the United States from which VSDA members may select the films to be offered their customers. Typically, VSDA members carry an average of approximately 2,400 different titles, including motion picture films, sporting events, documentaries, musical productions and educational aids.[3] Of the

[2] The *Washington Post* reported on August 28, 1985 the historical 1980 population of VCRs in the United States. *Communications Daily* reported on August 20, 1987 at 5, the vast increase in these devices, citing Nielsen figures. Statistics on the number of video software rentals per week were supplied to VSDA by Alexander & Associates, a consumer marketing consultant for the home entertainment industry.

[3] Unless otherwise noted, the following factual material is taken from a 1986 VSDA Annual Survey, which is a report on the business operations of a representative group of the regular members of VSDA.

titles available, some 3,300 have been characterized by their producers as adult films.[4] This classification is generally based on subjective criteria since the Motion Picture Association of America does not rate all films and there is no formal rating system for "adult" films.[5]

Given the sizable library of titles available to VSDA members and the substantial number of titles they must carry to meet consumer demand, it is not possible for the individual dealers to review each title to determine whether or not a film is obscene—even if one assumes that the standard for obscenity is clear enough for the individual retailer to apply it. Thus, the decision below threatens the ability of VSDA members and other retailers of video programming to continue offering not only these "adult" films but a far wider variety of programming as well.

That decision allows a prosecutor to seize books, video cassettes, magazines and other material presumptively entitled to First Amendment protection based on *ex parte* affidavits alleging that the material is the product of a criminal enterprise in which two obscene articles had been sold or distributed, without the need for an adversarial judicial determination that the seized material was obscene. Indeed, the court below did not require that the State comport with any of the requirements that this Court has imposed on those seeking to silence obscene materials, but allowed the State to confiscate the contents

[4] Videolog (video title looseleaf service), issue 33-1, August 14, 1987. These figures represent the number of films marketed by typical video retail stores within the United States.

[5] Characterizations of the films are made on the basis of distributor information which may not be applicable in certain jurisdictions where standards for what is or is not an "adult" film may differ. According to data available to VSDA, approximately 77% of its members carry "adult" films and those films equal about 13% of its their inventory.

of petitioner's bookstores based on an *ex parte* allegation that petitioner had sold at least two obscene books.

If the judgment below is not reversed, it will force VSDA's members and thousands of other retailers and distributors of video cassettes to avoid the distribution, rental or sale of films containing nudity or any other material that might result in a charge that the films are obscene, without regard to the artistic or cultural value of the films. This case, therefore, raises serious constitutional concerns threatening the First Amendment rights of VSDA's members and other distributors of literary and video material. The decision below also diminishes the public's ability to obtain films and other material that a local prosecutor, for whatever reason, may claim to be obscene. Given the sanctions authorized under the statutes on which the prosecutions below rested, sanctions that included the forfeiture of the entire inventory of a store and the loss of the right *ever* to engage in a similar business, these statutes will, unless invalidated by this Court, leave VSDA's members and other vendors of First Amendment materials little choice but to offer only the innocuous and the safe.

VSDA believes that such a result cannot be reconciled with the First Amendment and the decisions of this Court requiring that regulations affecting speech be carefully crafted to protect First Amendment values. As the representative of the nation's video cassette industry, VSDA believes that its participation in this proceeding will facilitate the Court's understanding of the issues raised and their implications for the full, free and unfettered enjoyment, in the privacy of the home, of programming that video cassettes have made available to the American people. Based on these reasons, this Court granted VSDA leave to participate as an *Amicus Curiae* in support of the Petition for Certiorari and, for the same reasons, VSDA respectfully requests leave to participate on the merits of the case by filing the attached Brief *Amicus Curiae*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-470

FORT WAYNE BOOKS, INC.,
Petitioner,

v.

STATE OF INDIANA, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Indiana

BRIEF OF VIDEO SOFTWARE DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

VSDA is the national trade association of the distributors and retailers of video cassettes that are rented or sold for use in the home. As demonstrated more fully in its accompanying Motion for Leave to File this Brief, VSDA is concerned that, unless the decision below is reversed, its approximately 3,000 members will be forced to limit the types of movies and other material they presently make available to the public. Under that decision, the State may, without any prior finding of obscenity,

subject VSDA's members to the most onerous sanctions, including the loss of their businesses, if they offer cassettes of movies that contain nudity or other material that some might claim to be obscene. This power to silence VSDA's members and other retailers or distributors of films and prerecorded video programming will profoundly chill their First Amendment rights and will deprive the public of access to quality movies and other programs that enjoy full First Amendment protection. It is to protect those interests that VSDA is participating in this proceeding.

STATEMENT OF THE CASE

This case presents the issue of whether the Indiana Racketeer Influenced and Corrupt Organizations law ("RICO") may be employed, consistent with the First Amendment, to confiscate books, movies and other forms of speech where there has been (a) no prior conviction for obscenity, the underlying criminal offense on which the State bases its right under RICO to confiscate the material, and (b) no judicial determination that the material confiscated is obscene.[1]

In the decision below, the Indiana Supreme Court upheld the constitutionality of the Indiana RICO and Civil Remedies for Racketeering Activity ("CRRA") statutes against First Amendment challenges on the grounds that they were intended to attack criminal racketeering and that any impact they might have on First Amendment rights was irrelevant to their constitutionality. *See 4447*

[1] While this case involves the Indiana RICO statute, that statute is based on the federal RICO statute, *Alvers v. State*, 489 N.E.2d 83 (Ind. App. 1986), and is similar to the RICO statutes in a substantial number of other states. Thus, this Court's resolution of the questions raised here will affect the manner in which those statutes are enforced nationwide.

Corp. v. Goldsmith, 504 N.E.2d 559, 565 (Ind. 1987). Under the RICO statute, violations of the State's obscenity laws are predicate offenses and permit prosecutors to seek both criminal and civil sanctions under the CRRA. Those sanctions include, *inter alia*, confiscating the assets of a bookstore deemed to have distributed two or more obscene books, prohibiting a violator from investing in, or operating, a similar enterprise, suspending a violator's business licenses or revoking its corporate charter.[2] Under the decision below, these sanctions may be imposed regardless of their effect on protected speech.

The proceedings below commenced with two separate enforcement actions that were subsequently consolidated. In one, prosecutors obtained an order to padlock an unopened bookstore on the basis of allegations that its owners operated two other bookstores that distributed obscene material. The Indiana Court of Appeals granted a stay of that order while the store owner appealed the lower court's denial of his motion to vacate the padlocking order. *Id.* at 561-62. In the other proceeding, prosecutors obtained a court order to padlock three stores and seize their contents on the basis of prior obscenity convictions. No stay of that order was issued. *Id.* at 562-63. In both cases, the orders authorizing the seizure and padlocking were issued on the basis of *ex parte* hearings with no notice to the store owners. In neither action has any trial yet been held to determine whether the stores closed contained any obscene material; instead, the initial padlocking orders were justified on the basis of allegations that the store owners *had* previously sold obscene material.

[2] See Indiana Code § 35-45-6-2(a) (RICO statute); Indiana Code § 34-4-30.5-2 (CRRA sanctions applicable to RICO violations). *See also* Indiana Code § 34-4-30.5-3(a) & (b) (forfeitures for RICO violations.) *See generally 4447 Corp.*, 504 N.E.2d at 560-61.

On appeal, the Indiana Court of Appeals vacated the orders of the lower courts sanctioning the padlocking and seizures. Citing this Court's language that " 'the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised . . .,' " *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 583 (Ind. App. 1985), *quoting Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981), the court of appeals held that the State statutes must be subject to "searching and realistic scrutiny," 479 N.E.2d at 584, since they infringed on petitioner's right to distribute and exhibit materials that were presumptively protected. The court found that, while the State unquestionably has an interest in restricting obscene speech, that authority is not unfettered, but " 'must be carefully limited' " lest protected speech be suppressed with the obscene. *Id.* at 585, *quoting Miller v. California*, 413 U.S. 15, 23-24 (1973).

The court of appeals went on to hold that the Indiana RICO and CRRA statutes failed that constitutional test on several independent grounds. First, it concluded that the challenged statutes were a prior restraint that impermissibly interfered with protected expression. 479 N.E.2d at 585-92. Second, it held that the statutes did not provide the procedural protections required before even obscene speech may be suppressed *Id.* at 593-98. Third, it found that, even if the statutes were viewed as content-neutral regulations that had only an incidental impact on speech, they did not satisfy the First Amendment because the State's legitimate regulatory goal could be achieved in a more narrowly tailored manner. *Id.* at 598-601.

The Indiana Supreme Court rejected this analysis and upheld the statutory scheme in its entirety. It reasoned that the statutes were aimed at fighting organized crime and thus the purpose of the padlocking and forfeitures ordered in the lower proceedings were unrelated to the

nature of the assets involved. According to the court, "it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene," *4447 Corp v. Goldsmith*, 504 N.E.2d at 565, for what is relevant is whether they are the product of a RICO violation. *Id.* at 564. Further, the court held it was not necessary for it to determine whether the defendants had been convicted of obscenity before the sanctions authorized by CRRA could be used; all that need be shown is a nexus between the confiscated property and the allegation that its owners had engaged in criminal conduct. *Id.* at 565-66. The court found that applying the First Amendment to the forfeitures involved would erect a "pseudo-constitutional barrier" to a State statute designed solely to combat racketeering. *Id.* In so ruling, the court swept obscenity cases into the general mill of anti-racketeering enforcement actions and equated obscenity violations with gambling, prostitution or loansharking.

Finally, the Indiana Supreme Court held that a defendant whose property has been seized pursuant to the statutory scheme is afforded due process by a "prompt" adversary hearing on a motion to vacate or, if such a motion is denied, by an adversary hearing on the question of forfeitures held within a "reasonable" time. *Id.* at 567. The court did not specify what these "prompt" or "reasonable" times might be; nor did it address the time frame for appellate review of such hearings, although petitioner in this case was unable to secure appellate review for over a year while its bookstores remained padlocked and their inventories were held in police custody.

Petitioner sought certiorari from this Court to review the constitutionality of this enforcement scheme and this Court granted the Petition on March 6, 1988. *Fort Wayne Books, Inc. v. State of Indiana*, 108 S.Ct. 1106 (1988).

SUMMARY OF ARGUMENT

The court below upheld the padlocking of petitioner's bookstores and the confiscation of their inventories on the grounds that those sanctions were designed to deny those engaged in racketeering the benefits of their illegal conduct. The court found that it was irrelevant that the goods being confiscated were books and that the bookstores targeted by the prosecutors were presumptively entitled to First Amendment protection. That rationale is inconsistent with the decisions of this Court holding that governmental action is to be tested on the basis of the right or interest affected and not the power being exercised. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981). Thus, the court below erred when it ignored the nature of the goods confiscated and concluded that it was irrelevant that the targets of the State's enforcement actions were bookstores.

The Indiana RICO and CRRA statutes upheld by the court below authorize classic prior restraints. These prior restraints include prejudgment padlocking and seizures, permanent forfeitures of bookstore inventories, and orders preventing persons from ever again opening or operating a bookstore or distribution system for speech. Moreover, the prejudgment sanctions can be imposed on the basis of *ex parte* allegations that defendants distributed obscene material. This Court has never upheld statutory or regulatory provisions that permit such severe infringement of speech and has condemned on First Amendment grounds similar broad brush governmental sanctions that affect First Amendment interests. *Near v. Minnesota*, 283 U.S. 697 (1931). Thus, the vast majority of courts that have addressed the issue have concluded that sanctions virtually identical to those employed by the Indiana statutes are unconstitutional.

The RICO and CRRA statutes upheld below cannot be justified as merely imposing another criminal sanction

for violating laws proscribing unprotected obscene material. They lack the safeguards associated with criminal prosecutions and foreclose speech at its inception rather than punishing those whose conduct is illegal. These statutes suppress far more than obscene material; they prevent the distribution of speech before there has been any determination that the material is in fact obscene. Further, they authorize draconian sanctions—including *permanent* restraints on speech—in civil proceedings in which the government need only meet the "preponderance of the evidence" test. However, where fundamntal rights are involved, this Court has required that a more substantial burden be imposed to impress upon the fact finder the importance of the determination and to preserve fundamental fairness. *Santosky v. Kramer*, 455 U.S. 745 (1982). *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

The Indiana statutes also fail in numerous respects to comply with the procedural requirements applicable to restraints even on obscene material. As this Court has consistently held, regulatory provisions designed to prohibit obscene speech must be carefully crafted lest they suppress protected speech as well. *Speiser v. Randall*, 357 U.S. 513, 525 (1958). The RICO and CRRA statutes upheld below cannot be reconciled with these requirements; rather than employing "sensitive tools," these statutes employ a bludgeon that indiscriminately suppresses protected and obscene speech. As a result, Indiana's statutes chill the distribution of protected speech and deny the public access to the diversity of thoughts and ideas the First Amendment was designed to promote.

ARGUMENT

I. Labeling Conduct As "Racketeering" Does Not Obviate the Requirement that the Regulation Be Tested Under the First Amendment

The court below found it unnecessary to determine whether padlocking bookstores or confiscating the materials in them infringed any First Amendment rights on the ground that the statutory provisions challenged here were not designed to foreclose speech but to deny those engaged in racketeering the benefits of their criminal enterprise. According to the court, the books that were seized were no different than clothing, furniture, hardware, gambling receipts or anything else that might have been acquired as a result of criminal conduct. As far as the court below was concerned, if the material seized was acquired as a result of a violation of the obscenity laws and thus a predicate offense under RICO, the material could be taken as if it were the bounty of a pirate ship.

The difficulty with this analysis, however, is that the criminal enterprise on which the State justifies its action is not itself devoid of communicative content and the target of the RICO sanctions were bookstores—one of the primary vehicles for the dissemination of protected speech. *See Schad v. Borough of Mount Ephraim*, 452 U.S. at 66; *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966); *Stromberg v. California*, 283 U.S. 359 (1931). Thus, the material confiscated, while perhaps the product of violations of the obscenity laws, nonetheless enjoys a heightened place in our constitutional hierarchy, unless it is obscene or otherwise among the very few classes of speech subject to limited constitutional protection. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985); *New York v. Ferber*, 458 U.S. 747 (1982); *United States v. O'Brien*, 391 U.S. 367, 376 (1967); *Dennis v. United States*, 341 U.S. 494 (1951); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Consequently, the application of the First Amendment to this conduct hardly constitutes a "pseudo-constitutional" protection of criminal conduct, as the court below reasoned, but rather is an essential part of the protection the Founding Fathers afforded speech from the State's very broad police powers. *Board of Education v. Pico*, 457 U.S. 853, 866-67 (1982); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Martin v. Struthers*, 319 U.S. 141, 193 (1943).

If the decision below is not reversed, a State could regulate a wide range of speech, including political speech, by making its utterance, or conduct associated with it, a criminal offense and a predicate to the application of RICO sanctions of the type invoked here. As noted above, the enforcement scheme upheld below would permit the imposition of the sanctions used against petitioner without any provision for a judicial determination that a crime has been committed. The only relevant question would be whether the property seized had a nexus to the speech that the State alleged to be unlawful.[3]

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[3] It is no answer to the constitutional infirmities of the decision below to assert that those affected could challenge in another proceeding whether they were guilty of the "predicate offense." Except in rare circumstances not present here, it is well established that those subject to the power of government have the constitutional right to challenge the basis of the exercise of that power at the time it is applied, and need not take the affirmative and challenge the statute before it is applied to them. *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). That is particularly true in the First Amendment area where the mere prohibition of certain types of speech can pretermit its utterance and deny the public the ability to hear the viewpoint that is now "illicit." *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he Constitution protect[s] the right to receive information and ideas," as well as the right to disseminate it.) *See also Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986); *Board of Education v. Pico*, 457 U.S. at 866-67; *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

As the court of appeals recognized, however, such a result cannot pass even the most casual First Amendment review. That Amendment was designed to protect the unpopular and the expression of views contrary to those in power. *See Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring). For that reason, this Court has consistently held that state regulatory activity is to be tested on the basis of the right or interest affected and not the power being exercised. *Schad v. Borough of Mount Ephraim*, 452 U.S. at 68.

Consistent with that injunction, this Court has regularly held that standards for suppressing gambling and similar crimes cannot establish the level of constitutional protection for regulations aimed at speech. *E.g., Vance v. Universal Amusement Co.*, 445 U.S. 308, 315 (1980); *Quantity of Books v. Kansas*, 378 U.S. 205, 211-12 (1964); *Marcus v. Search Warrant*, 367 U.S. 717, 730-31 (1961). Nor can penalty schemes for non-expressive activities be applied to expressive activity, even if that activity is the distribution of unprotected obscene material, where the effect is to diminish or frustrate speech. *Smith v. California*, 361 U.S. 147, 152-53 (1959).

Unlike enforcement schemes aimed at other criminal activities, making the distribution of obscene speech a criminal offense requires that the State act with care not to suppress protected speech at the same time. Thus, this Court has frequently admonished those seeking to regulate the obscene that they must use "sensitive tools" that do not unconstitutionally sweep speech that is sexually-explicit but not obscene into the net of the state's enforcement mechanism. *Miller v. California*, 413 U.S. at 23; *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

The court below ignored these holdings when it concluded that the nature of the conduct regulated as well as the nature of the ill-gotten gains were irrelevant to the legality of the sanctions imposed. In so doing, it crossed

the line between permissible regulation of criminal conduct and the unconstitutional regulation of speech. The protections of the First Amendment are not limited to statutes regulating speech directly, but extend to regulations designed to achieve legitimate governmental objectives which incidentally affect speech as well. *See Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 968 (1984); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980); *United States v. O'Brien*, 391 U.S. 367 (1967). While the government's burden to justify regulation is greater when the regulation directly affects speech than where it only indirectly affects it,[4] the mere fact that the regulation was designed to achieve a legitimate non-speech goal does not immunize it from First Amendment analysis. *Compare Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552 (1975) *with United States v. O'Brien, supra. Cf. Arkansas Writer's Project, Inc. v. Ragland*, 107 S. Ct. 1722, 1727 (1987) ("illicit legislative intent is not the *sine qua non* of a violation of the First Amendment"). Consequently, the basis of the Indiana Supreme Court's holding cannot be sustained.

II. Indiana's Application of RICO Sanctions to the Distribution of Allegedly Obscene Speech Is An Unconstitutional Prior Restraint

A. The Use of the RICO Sanctions Here Is a Classic Prior Restraint

Both the pre- and postjudgment remedies authorized in Indiana's RICO and CRRA statutes impose numerous prior restraints on speech that is presumptively protected. They do so by authorizing:

(1) prejudgment padlocking and seizures;

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[4] *Widmar v. Vincent*, 454 U.S. 263 (1981); *U.S. Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981).

(2) permanent forfeiture of all inventory and instrumentalities of a retailer or distributor of communicative material;

(3) license suspension or revocation;

(4) corporate charter revocation; and

(5) injunctions ordering violators not to participate in any future endeavors similar to the bookstores or video stores from which they distributed obscene materials.

Each of these measures prospectively suppresses speech, with no attempt to prove that all, or even a significant portion, of that speech is unprotected.

This Court has never upheld regulatory tools that infringe so deeply on speech and that are so inconsistent with the notion that regulation in the First Amendment area must be undertaken with "sensitive tools." *See, e.g., City of Houston v. Hill*, 107 S. Ct. 2502, 2510-11 (1987); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Speiser v. Randall*, 357 U.S. at 525. Under the reasoning of the court below, the RICO/CRRA statutes used here could be employed to confiscate the works of H.L. Mencken, Walter Lippman, John Stewart Mill, Montesquieu or the Founding Fathers themselves—political speech that lies at the heart of the First Amendment's protection—as long as that speech is tied to a predicate criminal offense under RICO, including a speech-related predicate.

Yet, "[t]he primary concern of the free speech guarantee is that there be full opportunity for expression in all of its varied forms to convey a desired message. Vital to this concern is the corollary that there be full opportunity for everyone to receive the message." *Young v. American Mini Theatres*, 427 U.S. 50, 76 (1976). *See also First National Bank of Boston v. Bellotti*, 435 U.S. at 777; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Stanley v. Georgia*, 394 U.S. at 564. This interest in assuring society access to the maximum diversity of views[5] requires that sanctions be imposed only for specific, proven transgressions and not to an undifferentiated class of books or movies. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Spokane Arcade, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980), *aff'd*, 454 U.S. 1022 (1981).

The dragnet approach to the obscenity laws employed by the Indiana RICO and CRRA statutes is similar to the blanket approach employed by the Minnesota public nuisance abatement statute in *Near v. Minnesota*, and suffers from the same First Amendment defects. Thus, this Court's analysis of that statute applies equally to the statutes in issue here. To paraphrase this Court:

> The object of the statute is not punishment, in the ordinary sense, but suppression of the offending [bookstore]. The reason for the enactment . . . is that prosecutions to enforce penal statutes for [obscenity] do not result in "efficient repression or suppression of the evils of [obscenity]." Describing the business of publication as a [racketeering offense], does not obscure the substance of the proceeding which the statute authorizes.
>
> • • • •
>
> If we cut through the mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner [of a bookstore] before a judge upon a charge of conducting a business of [distributing obscene material] and

[5] *See, e.g., Base Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 534 (1980); *Cohen v. California*, 403 U.S. 15, 24 (1971); *Whitney v. California*, 274 U.S. at 375 (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

> unless the owner . . . is able and disposed to bring competent evidence to satisfy the judge that the charges are [unfounded] his [bookstore] is suppressed . . . . *This is of the essence of censorship.*[6]

There is little question but that, as the Indiana Court of Appeals recognized, the prejudgment sanctions available under the Indiana RICO and CRRA statutes represent the same form of virulent prior restraint as the injunction issued in *Near*. 479 N.E.2d at 587. Regardless of whether the goals of the nuisance abatement statute in *Near* and the goals of the RICO and CRRA statutes here are noble or whether the evils to which they are directed are worthy of legislative action, the statutes themselves reflect an excess of zeal by banning the good with the bad. Not surprisingly, therefore, the vast majority of courts that have addressed the issue have concluded that similar statutes fail to pass First Amendment muster.[7]

Similarly, courts have "roundly condemned" statutes that authorize the withholding of business licenses or the forfeiture of those licenses based on prior convictions for the distribution of obscene material. In *Genusa v. City*

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[6] 283 U.S. at 711, 713 (emphasis added). This Court has stated "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Southeastern Promotion, Ltd. v. Conrad*, *supra*; *New York Times Co. v. United States*, 403 U.S. 713, 733 (1971) (White, J., concurring); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968).

[7] *See People ex rel. Busch v. Projection Room Theater*, 550 P.2d 600 (Cal.), *cert. denied*, 429 U.S. 922 (1976); *Commonwealth ex rel. Davis v. Van Emberg*, 464 Pa. 618, 347 A.2d 712 (1975); *Gulf State Theatres of Louisiana v. Richardson*, 287 So.2d 480 (La. 1973); *Mitchem v. State ex rel. Schaub*, 250 So.2d 883 (Fla. 1971). *See also Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022 (1981); *Vance v. Universal Amusement Co., Inc.* 445 U.S. 308 (1980).

of Peoria, 619 F.2d 1203, 1219 n. 40 (7th Cir. 1980), for example, the court stated:

> We know of no doctrine that permits the state to deny to a person First Amendment liberties . . . solely because that person was once convicted of a crime or other offense.

In *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983), the court held that a city ordinance providing for revocation of a theater or bookstore license for one year where the owner had been convicted of an obscenity violation imposed an unconstitutional restraint on presumptively protected expression. In language that is appropriate to this case, the court held that:

> [T]he City can no more impose such a prior restraint on the plaintiff than could it by ordinance restrain a citizen from speaking in public for one year because the citizen once uttered an obscenity in a public place.

Id. at 1552. *See also City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463 (6th Cir.), *cert. denied*, 107 S.Ct. 316 (1986).

Indiana's RICO and CRRA statutes cannot be distinguished from this authority. "The state can no more expect to reach protected interests by means of the RICO statutes than it could by means of moral nuisance or obscenity statutes." *State of Arizona v. Feld*, 745 P.2d 146, 156 (Ariz. App. 1987), *cert. denied*, 56 U.S.L.W. 3666 (U.S. Mar. 29, 1988) (No. 87-1246).[8]

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[8] *See generally Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); *Yuclan Enterprises, Inc. v. Arre*, 488 F. Supp. 820 (D. Haw. 1980); *Natco Theatres, Inc. v. Ratner*, 463 F. Supp. 1124 (S.D.N.Y. 1979); *Perrine v. Municipal Court*, 5 Cal.3d 656, 488 P.2d 648 (1971), *cert. denied*, 404 U.S. 1038 (1972).

B. RICO Enforcement Mechanisms Are Not Equivalent to Subsequent Criminal Enforcement

Although it is well established that the publication or distribution of obscene material can be made a crime,[9] the Indiana laws here cannot be justified by equating them with criminal prosecutions. First, criminal sanctions are not intended to *ban* the publication of material, but to *punish* those engaged in illegal conduct. Thus, criminal sanctions do not deny the public access to differing ideas or viewpoints but only penalize those who utter speech without constitutional protection. Further, criminal statutes leave to the citizen the right to make a choice as to what type of material to distribute [10] and afford him or her the full range of the protections of the criminal law before he or she may be convicted. The RICO/CRRA sanctions here, however, afford no such protection and are designed to stop speech at its inception.

Second, the RICO/CRRA sanctions, as upheld by the court below, prevented the distribution of speech before there had been any finding of a criminal violation or any determination that the material confiscated was obscene. Rather than punishing petitioner based on a conviction of uttering obscene speech, the court below authorized the confiscation of material—some of which presumably was fully protected by the First Amendment—based on an *ex parte* representation that petitioner had in the past distributed obscene material. This Court has never sanctioned such draconian use of power where First Amendment interests are at stake. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. at 70.

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[9] *See Miller v. California, supra*; *New York v. Ferber*, 458 U.S. at 754; *United States v. 12 200-ft Reels of Film*, 413 U.S. 123 (1973); *Ginsburg v. New York*, 390 U.S. 629 (1968).

[10] *See generally* Hart & Sacks, *The Legal Process, Basic Problems in the Making and Application of Law*, at 132-34 (Tentative ed. 1958).

Third, we have been unable to find any decision in which this Court has upheld, or indeed even been faced with, a penalty that permanently restrained speech. Clearly, penal sanctions for violating the obscenity statutes do not involve such a ban.

Fourth, as interpreted by the court below, property may be confiscated and bookstores padlocked in a civil proceeding in which the State can show that the property was derived from criminal conduct that is a predicate to the application of RICO sanctions. No showing is required that petitioner was guilty of distributing obscene material. It is sufficient, under the decision below, that a causal nexus exists between the property the government seizes and the conduct which the government alleges was illegal. Moreover, that conduct can be established in an *ex parte* proceeding. That standard is not in keeping with this Court's admonition that the government must protect speech from over-zealous prosecutors, who may be well intended but who, for whatever reasons, are not sufficiently sensitive to First Amendment values.[11]

Ultimately, the application of the RICO/CRRA forfeitures to speech violations must be seen for what it is: an attempt to circumvent the burdens and difficulties in obtaining a conviction under this Court's rules applicable to obscenity prosecutions. Those carefully crafted rules, however, were not designed to thwart governmental efforts to suppress obscenity but to insure that those efforts did not sweep more broadly and encompass fully protected speech. *E.g., Miller v. California*, 413 U.S. at 18-20. Thus, just as the statute in question in *Near* was found to violate the First Amendment because it stifled speech without any determination that the State had the right to regulate that speech, so too the RICO and CRRA

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[11] As Mr. Justice Brandeis noted, "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

statutes here authorize the seizure of books, records and other modes of expression without any proof that they are illegal. Consequently, rather than using the surgical knife required by this Court to regulate in this area, the State has employed a blunderbuss. That statutory scheme cannot survive First Amendment analysis.

III. The Lack of Procedural Safeguards and the Use of the Lowest Civil Standard of Proof Renders the Use of the RICO and CRRA Statutes Here Unconstitutional

A. The Indiana Statutes Do Not Provide for Prompt Judicial Review of Enforcement Actions

The procedural infirmities of the Indiana RICO and CRRA laws, both facially and as applied in this proceeding, are clear. Massive seizures of materials that have not been found to be obscene or otherwise unprotected cannot be based on *ex parte* representations, *Marcus v. Search Warrant*, *supra*; *Quality Books v. Kansas*, *supra*; and padlocking orders of indefinite duration can not be justified at all. *Vance v. Universal Amusement Co.*, *supra*; *Freedman v. Maryland*, *supra*.

Although the court below attempted to avoid these constitutional infirmities by requiring an adversarial hearing within a "prompt" or "reasonable" time after the seizure order, it failed to establish that time frame and thus failed to cure a fundamental defect in the statutes.[12]

[12] It is far from clear that, even if the court below had specified a prompt time period in which the adversarial hearing had to be held, it would have cured this defect in the enforcement scheme. While a prompt hearing within a specific time frame might satisfy the due process requirements of the First Amendment, the court below made it clear that the State had the right to confiscate literary and cultural material without regard to whether the material itself was obscene as long as petitioner had engaged in the predicate offense. Thus, the approach set forth by the court below would not assure that petitioner could attack the underlying statute. Rather, the rationale of the court below would appear to allow petitioner to question only the causal connection between the predicate offense and the property subject to confiscation. That limited scope of review is not sufficient to protect the First Amendment issues at stake here.

Further, the statutes do not provide for prompt appellate review of the initial judicial decision, and, in fact, in this case appellate review took over a year and was achieved in one case only after the parties sought relief from a Justice of this Court.[13] Such procedural provisions cannot be reconciled with the requirements of this Court's decision in *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). *See also Freedman v. Maryland*, 380 U.S. at 58-59; *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 70.

Consequently, the Indiana statutes do not comply with the procedural requirements this Court has established for legislation regulating speech. These statutes permit Indiana prosecutors to drag owners of bookstores, video stores, magazine retailers and distributors of protected materials into the labyrinth of RICO enforcement proceedings without appropriate judicial protection. Businesses can be ruined and protected speech suppressed for extended periods without any redress or any means of protecting the public's First Amendment interests.

B. Indiana's Use of the Lowest Civil Burden of Proof For Invoking RICO/CRRA Sanctions Does Not Adequately Protect First Amendment Interests

Not only does the Indiana enforcement scheme deny those subject to RICO action adequate judicial review, it also permits the State to silence speech by relying on the least stringent standard of proof in civil cases: a "preponderance of the evidence." Under the Indiana Act, video stores renting movies containing nudity or a bookstore selling the works of Henry Miller, D.H. Lawrence

[13] *See Fort Wayne Books v. Indiana*, Docket No. A-734 (Stevens, J.) (April 4, 1985).

or James Joyce can be shut down and the public's ability to view those movies or to read those books can be foreclosed based on a finding that a "preponderance of the evidence" establishes a connection between the video retailer or bookstore and the sale of two obscene items.

Given the serious intrusion on First Amendment interests authorized by those statutes, reliance on the preponderance of the evidence standard cannot be constitutionally justified.[14] That is particularly true given the fine line that frequently exists between that which is obscene and that which has "redeeming social value." *Miller v. California*, 413 U.S. at 20-21; *Roth v. United States*, 354 U.S. 476, 484-85 (1957). Reliance on the "preponderance of the evidence" test does not provide the degree of protection afforded by the "clear and convincing" or the criminal "beyond a reasonable doubt" standards,[15] and subjects a bookstore or video dealer to an in-

[14] VSDA recognizes that in a *per curiam* decision this Court held that nuisance abatement actions aimed at suppressing obscene speech need not be proven by the criminal standard of "beyond a reasonable doubt." *California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90 (1981). Nevertheless, the Court left open whether the State could rely on the lower civil "preponderance of the evidence standard" or was required to use a more stringent civil standard, *i.e.*, "clear and convincing evidence." On remand, the California Appellate Court concluded that the "clear and convincing evidence" standard was required by the First Amendment before the State could suppress allegedly obscene material. *People ex rel. Cooper v. Mitchell Bros.*, 128 Cal. App.3d 937, 180 Cal. 728, *cert. denied*, 459 U.S. 944 (1982).

[15] VSDA believes, for the reasons set forth by Mr. Justice Brennan in *McKinney v. Alabama*, 424 U.S. 669, 683-84 (1976), that the proper burden of proof in cases such as these, where the "civil sanctions" are as pernicious as most criminal sanctions, should be the criminal standard. No other standard provides the same protection of society's interest in assuring the availability of the widest range of social, cultural and political thought. However, in light of this Court's holding in *Mitchell Bros.*, the State would appear to have the right to employ a civil standard of proof not-

creased risk that a miscalculation of the boundary between obscene and protected speech will result in the confiscation of the dealer's inventory and loss of his or her license to earn a living. *See McKinney v. Alabama*, 424 U.S. at 683-84 (concurring opinion). Consequently, if the public's interest in an informed and educated public is to be fully protected, the harsh punishments of Indiana's RICO and CRRA laws cannot be based on only the "preponderance of the evidence" standard but at least the "clear and convincing" standard must be employed.[16]

The higher burden of the "clear and convincing" standard is no stranger to civil proceedings. This Court has required its use in civil cases involving particularly important civil liberties, *e.g.*, *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation), and it has been applied in cases involving other presumptively protected expressions. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973) (libel). *Cf. Hustler Magazine v. Falwell*, 108 S.Ct. 876 (1988). The reason why this higher burden of proof is required was explained in *Santosky v. Kramer*, 455 U.S. 745 (1982), a case involving the loss of parental rights. There this Court stated that the higher burden of proof

withstanding the onerous sanctions authorized by its RICO and CCRA statutes.

[16] VSDA is aware that the difference in burdens is largely one of persuasion rather than the introduction of evidence, but, as this Court held in *Mitchell Bros.*, *supra*, the standard of proof "'instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Mitchell Bros.*, 454 U.S. at 92-93, quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J.). Thus, the difference between the degree of persuasion needed to satisfy the "preponderance of the evidence" test and the "clear and convincing" test is important given the profoundly chilling effect of the enforcement scheme here. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

better meets the practical need to preserve fundamental fairness and the symbolic need of impressing upon the factfinder the importance of the decision than does the "preponderance of the evidence."

These same considerations apply here where the State professes the power to silence speech and confiscate material otherwise enjoying full First Amendment protection. Given the strong feelings and vague factual determinations implicit in obscenity proceedings, the higher civil burden of proof is clearly required for the same practical and symbolic interests articulated in *Santosky*.

IV. Indiana's Injunctive Provisions Chill Protected Speech In Violation of the First Amendment

To the owner of a single video store in Indiana faced with government seizure of his entire livelihood and all his savings in any manner connected with the store, Indiana's RICO and CRRA statutes impose an irresistible compulsion to steer clear of films that can even remotely bring down the local prosecutor on the store. To the owner of a chain of stores whose entire business, including unopened outlets, can be suppressed on the basis of a tiny portion of the material distributed at but one of the stores, the statutes here in issue assume a similar significance. So too, for individuals who can be ordered never again to invest in or operate bookstores and for corporations that can have their right to do business and their very corporate existence terminated, these statutes assume an importance and have a chilling effect on speech that cannot be overestimated.

If the First Amendment is to remain a bulwark against governmental intrusion into the free marketplace of ideas these provisions cannot be allowed to stand. With such statutes in effect, bookstores, video retailers, magazine vendors and distributors of various media of communication will avoid material they believe *may* be deemed ob-

scene by the local prosecuting attorney lest they risk *all*. As a result, the public will be deprived of some of the finest books and movies as vendors engage in the self-censorship this Court has consistently held to be antithetical to First Amendment interests. *Southeastern Promotions, Ltd. v. Conrad, supra; New York Times Co. v. Sullivan, supra.*[17]

As the lower courts that have addressed statutes imposing similar sanctions have concluded,[18] Indiana's RICO/CRRA statutes impose too substantial a price on the First Amendment interests of both speakers and listeners to withstand First Amendment analysis. Confiscation, padlocking and the other RICO/CRRA sanctions may be appropriate when aimed at the distribution of non-expressive material that is the product of a criminal enterprise unrelated to speech, but they have no place in the enforcement of statutes affecting speech, where the line between that which is protected and that which is not is necessarily vague and ill-defined. *See New York v. Ferber*, 458 U.S. 747 (1982); *Miller v. California*, 413 U.S. at 20-21; *Chaplinsky v. New Hampshire*, 315 U.S. at 571-72.

This Court has consistently held that even regulations designed to achieve a legitimate content-neutral objective must be narrowly drafted to achieve that goal where it has an incidental impact on speech. *United States v. O'Brien*, 391 U.S. at 377. Thus, even if one were to analyze this case in the terms used by the court below, the decision cannot stand. Even if the RICO/CRRA statutes were designed to achieve content neutral purposes, they do so in a manner that suppresses speech unnecessarily.

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[17] It should also be noted that the discretion which these statutes give local prosecutors can also be used to exercise control over speech of those engaged in a communicative medium. Thus, unwanted criticism can be forestalled by threatening enforcement action under the RICO/CRRA statutes.

[18] *See, e.g.*, cases cited at note 7, *supra*.

CONCLUSION

At the outset of this brief, VSDA urged this Court to look at the effect and operation of the Indiana RICO and CRRA laws on the conduct to which they have been applied, rather than accept the State's characterization of them as neutral law enforcement tools. As VSDA has shown, these statutes are not simply law enforcement vehicles, but they also permit the State to reach beyond the obscene, and well into protected speech. The *in terrorem* effect of the sanctions will restrain the distribution of protected speech by those who are fearful of offering material a local prosecutor deems to be obscene.

In this case, the sanctions were imposed on bookstores without any finding that the stores were engaged in the distribution of obscene material or that the material confiscated was obscene. As a result, unless the decision of the court below is reversed, it will have a profoundly chilling effect on the owners of bookstores, video retailers and others, effectively precluding them from making available books or films that might conceivably cross the line from the protected to the obscene. Thus, rather than employing "sensitive tools" to regulate in this First Amendment area, Indiana has elected to employ a bludgeon that censors speech contributing to an informed and cultured society as well as the obscene speech to which it is directed. The decision below upheld those statutes in the face of this and the other First Amendment defects established above; it cannot stand. For the reasons set forth above, VSDA hereby requests this Court to reverse the decision below and declare the Indiana RICO and CRRA statutes unconstitutional.

Respectfully submitted,

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No. 87-470

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

—v.—

STATE OF INDIANA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND INDIANA CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND INDIANA CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND INDIANA CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union (ACLU) and the Indiana Civil Liberties Union hereby move for leave to file the attached brief amicus curiae, pursuant to Rule 36.3 of

the Rules of this Court. The reason for the motion is that counsel for respondents has refused to consent to the filing of an amicus brief by the ACLU.

The ACLU is a nationwide, nonpartisan organization with over 250,000 members dedicated to the principles of individual liberty embodied in the Constitution. The Indiana Civil Liberties Union is one of its statewide affiliates. Since its founding nearly 70 years ago, the ACLU has been especially active in free speech cases. Indeed, the ACLU has participated in literally dozens of free speech cases before this Court, either as counsel for one of the litigants or as amicus curiae.

This case raises free speech concerns of vital importance to the ACLU. In recent years, law enforcement officials

around the nation have increasingly relied on RICO-type statutes to seize and suppress expressive material that is presumptively entitled to constitutional protection. They have done so, moreover, without the procedural safeguards that would normally apply in a First Amendment context. By endorsing these initiatives, the decision below seriously jeopardizes core First Amendment principles.

Because the ACLU believes that decision is erroneous, we respectfully move for leave to file the attached brief amicus

curiae in order to present the Court with our views in this important First Amendment case.

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No. 87-470

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

v.

STATE OF INDIANA, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF INDIANA

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND INDIANA CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

INTERESTS OF AMICI

The interests of amici are set forth in the motion attached to this brief.

SUMMARY OF ARGUMENT

The decision of the Indiana Supreme Court ignores fifty years of precedent in refusing to apply First Amendment scrutiny to the State's attempt to control obscenity through its RICO law. The State may not forestall such scrutiny by characterizing the statute as a speech-neutral anti-racketeering weapon, since it is the nature of the right threatened -- rather than the State's choice of labels -- that determines the character of constitutional protection.

Measured against First Amendment standards, the Indiana law is constitutionally deficient, both procedurally and substantively. The law allows mass seizures of presumptively protected material based upon a mere ex parte showing of probable cause to believe that two obscenity offenses have been

committed -- violating a rule of thirty years' standing requiring an adversarial adjudication of obscenity prior to such seizures. In addition, the statute fails to place the proper burden upon state officials to institute prompt post-seizure proceedings, fails to guarantee a speedy and final adjudication on the merits, and fails to guarantee that any prior restraint pending final adjudication and appeal will be fixed and strictly limited.

The ultimate remedies of the Indiana RICO law also operate as prior restraints on protected speech. Upon proving that a bookstore has sold two obscene books, the State may padlock it, permanently seize its inventory, revoke its license, and obtain an order restricting its owner from conducting a similar enterprise in the future. Like the injunction barring future publication in Near v. Minnesota, 283 U.S. 697 (1931), these

"punishments" have the direct, immediate, and unavoidable effect of stifling future protected speech. For all these reasons, the Indiana statute must be declared unconstitutional.

ARGUMENT

I.

THE PROTECTIONS OF THE FIRST AMENDMENT MAY NOT BE CIRCUMVENTED BY RE-LABELING OBSCENITY REGULATION AS AN ATTACK ON "RACKETEERING"

Under the Indiana RICO law, a bookstore may be padlocked, and its entire inventory seized, if a judge accepts the ex parte allegation of a police officer that the establishment has sold or exhibited two or more obscene items within five years. If this "pattern of racketeering activity" is proven at trial, the full array of RICO remedies -- including forfeiture, license

revocation, and restrictions upon future activities -- may be imposed upon the bookstore and any related entities constituting an "enterprise," putting them completely out of business.

Despite the obvious and severe impact of these draconian measures upon speech-related activity, the Indiana Supreme Court upheld the statute as a speech-neutral regulation of "racketeering." Through this use of the "racketeering" rubric, the Indiana Supreme Court would permit what this Court has prohibited for more than half a century: the circumvention of basic First Amendment doctrine through semantic devices that attempt to bring laws restricting free speech under the mantle of neutral governmental regulation. This Court and other courts, for example, have refused to allow state officials to suppress speech merely by

dubbing it a "public nuisance." The Court should similarly reject the notion that labeling allegedly obscene speech as "racketeering activity" renders First Amendment standards inapplicable.

In failing to scrutinize the RICO law under these standards, the Indiana Supreme Court ignored this Court's admonition that "in passing upon constitutional questions, the court has regard to substance and not to mere matters of form, and . . . the statute must be tested by its operation and effect." Near v. Minnesota, 283 U.S. 697, 708 (1931). In Near, the Court struck down a statute declaring the publication of a "malicious, scandalous, and defamatory" publication to be a nuisance, and providing for the permanent injunction of "such nuisance." Id. at 702-03. Despite Minnesota's argument that the injunction

entered under the statute was a content-neutral measure in the nature of a business regulation, this Court held that the law must be scrutinized for its impact on future protected speech. "Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." Id. at 720.

The Court has never departed from this holding of Near; fifty years later it declared that "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981). In Schad, the Court reviewed under the First Amendment a governmental ban on nude dancing despite the assertion that the regulation was

merely an exercise of state zoning power. Id. It is the effect of state regulation on speech activity -- and not simply its form or stated purpose -- that determines the degree of scrutiny to be applied.

State anti-racketeering laws, modeled on the federal RICO statute, are but the most recent method adopted by local officials seeking more effective civil weapons against alleged obscenity. State and local governments have used zoning provisions, building code enforcement, licensing laws, and, most prominently, nuisance abatement laws, to augment criminal obscenity prosecutions. See Note, Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power, 58 N.Y.U. L. Rev. 1478, 1478 (1983). Because such varied means of barring or restricting expression borrow from doctrines embodying

minimal procedural safeguards, courts have been careful to scrutinize these laws under traditional First Amendment standards.

For example, most courts have rejected attempts to apply so-called "red light" laws or general public nuisance abatement statutes to enjoin the distribution of obscene materials, noting that these statutes do not reflect modern First Amendment standards both of substance and procedure. See cases collected in Note, supra, at 1486 & nn. 61-63. Even when states have amended or enacted statutes expressly to address obscenity as a "public nuisance," courts have not hesitated to demand compliance with First Amendment requirements. See, e.g., Vance v. Universal Amusement Co., 445 U.S. 308, 317 (1980) (per curiam) (striking down obscenity injunction for failure to provide constitutionally adequate proce-

dures); Spokane Arcades, Inc. v. Brockett, 631 F.2d 135 (9th Cir. 1980) (same), aff'd mem., 454 U.S. 1022 (1981); Sanders v. State, 231 Ga. 608, 613, 203 S.E.2d 153, 157 (1974) (invalidating padlock order as prior restraint).

The use of RICO-style laws to attack pornography must be subject to the same rigorous constitutional review. The fight against racketeering -- like land use regulation and the abatement of public nuisances -- is of course a legitimate sphere for the exercise of governmental power. But when the exercise of that power touches areas of arguably protected expression, the procedures employed must be suited to the delicate sphere of the First Amendment.

The recent decision in Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S. Ct.

3172 (1986), supports the application of First Amendment principles in the present case. In Arcara, this Court held that heightened First Amendment scrutiny was not required for a padlock sanction imposed upon a bookstore that had permitted prostitution and other illegal sexual activities on the premises. The Court expressly distinguished cases in which the offenses triggering governmental restrictions themselves involved speech-related activity, concluding that "the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books." 106 S. Ct. at 3178. In short, "[t]he legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity." Id.

Here, by contrast, Indiana seeks to apply the short-cut procedures and drastic remedies of its RICO law not to combat prostitution or other illegal sexual conduct, but to suppress allegedly obscene materials. Following the distinction drawn in Arcara, both the procedures and remedies of the Indiana RICO statute must be scrutinized under the First Amendment. As Justices O'Connor and Stevens stressed in a separate concurring opinion in Arcara:

> If . . . a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review.

Id. (O'Connor, J., concurring).

In the Fort Wayne case, the Indiana Supreme Court noted that obscene material is

not protected by the First Amendment, and held that the legislature could therefore include obscenity as a predicate offense under the RICO law without triggering any special scrutiny or heightened procedural requirements. See 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 564-67 (Ind. 1987). But the court disregarded the crucial distinction between regulation of non-expressive conduct, like the prostitution in Arcara, and procedures used to regulate and punish speech. Where the target of state regulation is expression -- including what may be found after proper procedures to be unprotected expression -- First Amendment standards must be honored in fashioning the procedures. See Freedman v. Maryland, 380 U.S. 51, 57-59 (1965).

This Court has repeatedly stressed that "the line between speech unconditionally

guaranteed and speech which may legitimately be regulated, suppressed or punished, is finely drawn. The separation of legitimate from illegitimate speech calls for . . . sensitive tools." Speiser v. Randall, 357 U.S. 513, 525 (1958) (citations omitted). In the obscenity context, this concern operates with particular force. "[C]onstitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963). "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." Marcus v. Search Warrant, 367 U.S. 717, 731 (1961).

In Marcus, the Court rejected an attempt to analogize the seizure of allegedly obscene books to the seizure of gambling equipment or other contraband. Because of the danger of suppressing protected speech, extra scrutiny and procedural safeguards were required. Id. at 730-31. This principle applies to the category of "racketeering" equally with that of "contraband."

Lower court decisions scrutinizing the application to obscenity of state RICO laws, while differing in their ultimate holdings, have consistently required that these statutes pass muster under the First Amendment. See, e.g., United States v. Pryba, 674 F. Supp. 1504, 1511-18 (E.D. Va. 1987); State v. Feld, 155 Ariz. 88, 745 P.2d 146, 152-56 (Ct. App. 1987), cert. denied, 99 L. Ed. 2d 482 (1988). By contrast, in the Fort Wayne case, the Supreme Court of Indiana

failed even to recognize the First Amendment issues implicated by the RICO scheme and treated the Indiana statute purely as an exercise of the State's power to combat racketeering. This was obvious error. The Indiana statute must be scrutinized with reference to its actual operation and effect in regulating speech and speech-related activities.

II.

THE INDIANA RICO LAW FAILS TO EMBODY THE PROCEDURAL SAFEGUARDS MANDATED BY THIS COURT BEFORE SPEECH MAY BE SUPPRESSED ON THE GROUND THAT IT IS UNPROTECTED

We demonstrate below that the remedies provided by the Indiana RICO law operate as unconstitutional prior restraints of protected speech. See Point III infra. But even if they did not -- indeed, even if every single item suppressed under the statute turned out to be obscene, and therefore unprotected -- the statutory scheme would still have to provide the procedural safeguards mandated by this Court's First Amendment cases. The Indiana statute fails in several respects to satisfy these standards, and for this independent reason must be declared unconstitutional.

Ever since Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), which upheld a narrowly-drawn injunction against specific books adjudicated obscene, this Court has required all injunctive schemes aimed at alleged obscenity to embody sufficient procedural safeguards against the suppression of protected speech. Ever mindful of the need for "sensitive tools" in separating obscene from non-obscene speech, Speiser v. Randall, 357 U.S. 513, 525 (1958), the Court has strictly limited circumstances allowing mass seizures, and has defined procedural requirements for actions seeking to enjoin the sale or exhibition of particular named or unnamed items.

The Indiana RICO statute authorizes ex parte seizure and padlocking upon a showing of probable cause to believe that violations of the statute have been

committed; shifts the burden of obtaining judicial review to the defendant; fails to provide a prompt adversarial hearing on the question of obscenity; and provides no safeguard against restraints of indefinite duration pending appellate review. Each of these aspects violates the clearly articulated standards of this Court. Therefore, regardless of the merits of the particular post-trial remedies provided by the Indiana statute, the law is facially unconstitutional on procedural grounds alone.

A. The Indiana Law's Seizure Provision Violates this Court's Long-Standing, Unequivocal Rule Against Mass Seizures Prior to an Adjudication of Obscenity

In Kingsley Books, this Court approved an ex parte injunction against a particular book, followed by a trial on the merits within one day, and a decision within

two days of the close of trial. 354 U.S. at 437 n.1. The Court stressed that the New York provision "studiously withh[eld] restraint upon matters not already published and not yet found to be offensive." Id. at 445. Consistent with Kingsley Books, the Court has, over the last three decades, consistently disapproved procedures permitting the mass seizure of presumptively protected material prior to an adversary judicial determination of the obscenity of the items seized.

In Marcus v. Search Warrant, 367 U.S. 717 (1961), the Court struck down a scheme, remarkably similar to the one at issue here, permitting a judge to issue an ex parte warrant commanding seizure of all allegedly obscene material upon a finding of probable cause to believe that an obscenity violation had been committed. A hearing to

determine the obscenity of the seized material had to be set between five and twenty days after the seizure, but no time limit was provided for a decision. See id. at 718-21.

The Court invalidated these procedures on grounds directly applicable to the present case. Chief among the statute's infirmities was that "the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene." Id. at 731-32. The Court pointedly distinguished between the carefully limited injunction approved in Kingsley Books and "a scheme which in operation inhibited the circulation of publications indiscriminately because of the absence of any such safeguards." Id. at 734-35.

The Court further held that the provision for an accelerated obscenity hearing was inadequate because the statute did not guarantee a speedy decision. The Court noted with disapproval that two months had elapsed between seizure and decision -- unacceptable for a mass seizure. Id. at 737-38. "Kingsley Books does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene." Id. at 735-36.

The Court has reaffirmed and expanded this holding in subsequent cases. In A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964), a plurality of the Court invalidated a seizure "strikingly similar" to the one in Marcus. Id. at 209. Justice

Brennan's opinion held that the seizure order was not saved by provision of a full post-seizure adversary hearing on the question of obscenity. "For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books." Id. at 213. In Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175 (1968), the Court indicated that Marcus and Quantity of Books stand for a general presumption, applicable beyond the obscenity setting, against prior restraints issued without notice and an opportunity to be heard in an adversary proceeding. Id. at 181-82.

Heller v. New York, 413 U.S. 483 (1973), underscored the distinction between the Marcus line of cases and the specific, narrowly drawn injunctive relief approved in

Kingsley Books. In Heller, the Court upheld the seizure of one copy of a single film for the limited purpose of preserving it as evidence. The Court noted that no restraint of any kind had been placed upon continued exhibition of the film or any other materials, and that the defendant had never sought expedited judicial consideration of either obscenity or the validity of the seizure. Id. at 490. The Court expressly distinguished cases concerning "the seizure of large quantities of books for the sole purpose of their destruction," and assured that "[c]ourts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of A Quantity of Books and Marcus are fully met." Id. at 491 (emphasis added).

The vitality of the Marcus-Quantity of Books rule was recently reaffirmed in New York v. P.J. Video, Inc., 475 U.S. 868 (1986), in which the Court recognized again the requirement that "the large-scale seizure of books or films constituting a 'prior restraint' must be preceded by an adversary hearing on the question of obscenity." Id. at 873.

The Indiana RICO statute, by authorizing mass, ex parte seizures and padlocking of the premises prior to any judicial determination of obscenity, violates this Court's long-settled rule. The Indiana Court of Appeals examined this point at length, concluding that a procedure permitting "en masse seizure" of inventory based upon "ex parte determinations only as to the probability of obscenity violations, with no regard to the obscenity of all seized

materials," and based "exclusively upon conclusory assertions and descriptions by police of alleged obscenity," was unconstitutional under Marcus and Quantity of Books. 4447 Corp. v. Goldsmith, 479 N.E.2d 578, 595-96 (Ind. Ct. App. 1985). The Indiana Supreme Court failed even to mention Marcus or the question of mass, ex parte seizures, discussing only the post-seizure procedural requirements addressed below in Point II(B). The constitutional violation recognized by the Court of Appeals remains obvious and irrefutable.[1/]

The unspoken rationale for the Indiana court's disregard of Marcus and its progeny may be its view of the Indiana RICO

1/ Before authorizing mass seizure of printed materials, the trial court should also have required obscenity to be demonstrated by clear and convincing evidence. See California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 92-94 (1981).

statute as a speech-neutral anti-racketeering weapon. If purveying obscene materials is seen merely as a variety of "racketeering activity," then the issuance of a warrant permitting mass seizures of property need only be justified by minimal due process standards. But as noted above in Point I, merely re-labeling an obscenity regulation as an anti-racketering measure does not obviate First Amendment requirements. The need for "sensitive tools" to separate protected from unprotected speech bars Indiana from treating presumptively protected printed materials as it treats narcotics, gambling paraphernalia, or other contraband. See Quantity of Books, 378 U.S. at 211-12; Marcus, 367 U.S. at 730-31.[2/]

2/ Cf. Smith v. California, 361 U.S. 147, 152-53 (1959) (requiring scienter for obscenity prosecution): "There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but
(footnote continued)

B. The Indiana RICO Statute Fails to Provide Constitutionally Required Post-Seizure Safeguards, Including a Prompt Judicial Resolution of Prior Restraint Issues

In addition to the absolute ban on ex parte mass seizures, this Court has established minimum procedural requirements governing injunctions against specific, allegedly obscene items. Both the interim injunctions and the permanent remedies provided by the Indiana RICO statute violate these standards.

In Freedman v. Maryland, 380 U.S. 51 (1965), the Court invalidated a Maryland prior review system allowing largely unfettered administrative discretion to ban films, setting no time limits for the review

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the constitutional guaranties of freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller."

procedure, and prohibiting the showing of banned films unless the exhibitor undertook an appeal to the Maryland courts. Id. at 54-55. In striking down this scheme as a prior restraint, the Court established three procedural requirements, further refined and amplified by subsequent cases, that must be met by any state seeking to enjoin the display or dissemination of allegedly obscene material.3/

First, Freedman held that "the burden of proving that the film is unprotected expression must rest on the censor." 380 U.S. at 58. Subsequent cases

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3/ Although Freedman addressed only film censorship, subsequent cases dealing with printed materials have given its rules more general application. See, e.g., McKinney v. Alabama, 424 U.S. 669 (1976); Spokane Arcades, Inc. v. Brockett, 631 F.2d 135, 138 (9th Cir. 1980), aff'd mem., 454 U.S. 1022 (1981).

have made clear that the state also has the burden of instituting prompt judicial review. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 562 (1975); Spokane Arcades, Inc. v. Brockett, 631 F.2d 135, 138 (9th Cir. 1980), aff'd mem., 454 U.S. 1022 (1981).

Second, Freedman required that a prompt, final, adversary adjudication on the issue of obscenity be assured "by statute or authoritative judicial construction." 380 U.S. at 58-59. In National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) (per curiam) ("Skokie"), the Court extended the "strict procedural safeguards" of Freedman to the appellate process, holding that an injunction restraining First Amendment activity must be accorded "immediate appellate review" or stayed pending appeal. Id. at 44. See also M.I.C., Ltd. v. Bedford

Township, 463 U.S. 1341, 1343 (1983) (Brennan, Circuit Justice) (requirement of "'prompt final judicial decision,'" quoting Freedman, 380 U.S. at 59, required stay of preliminary obscenity injunction pending appeal where appellate review "will not be completed for several months").

Third, Freedman required that any restraint prior to judicial review must be "limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." 380 U.S. at 59. The Court elaborated on this requirement in Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curiam), in which it struck down a nuisance abatement statute permitting "prior restraints of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene." Id. at 316. The Court held that "the absence

of any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures" violated Freedman and rendered the statute unconstitutional. Id. at 317.

The Indiana RICO statute is constitutionally infirm under these cases for several reasons. The statute places no burden upon the state to bring about prompt judicial review of either the validity of the seizure or the obscenity of the seized materials. Having obtained, on an ex parte, probable cause showing, an order authorizing seizure of all inventory and padlocking of the premises, the prosecuting attorney has no further burden except to commence an action for permanent forfeiture within 180 days. See Ind. Code § 34-4-30.5-4(c) (1986). The burden is entirely upon the defendant to bring about judicial review of the initial

seizure and prompt judicial determination of obscenity.

The Indiana Supreme Court did not expressly address this issue, apparently assuming that it was acceptable to put the burden upon a defendant to "initiate such action by the filing of a motion to vacate the seizure order." 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 567 (Ind. 1987). Since neither the statute nor Indiana's highest court have properly placed the burden upon the State, the statute is unconstitutional under Freedman and Southeastern Promotions.

Even where, as here, a defendant assumes the burden of initiating judicial proceedings to challenge a seizure, the Indiana RICO statute fails to provide "a prompt final judicial decision" or to limit the prior restraint pending that decision to

"the shortest fixed period compatible with sound judicial resolution." Freedman, 380 U.S. at 59. As demonstrated in Petitioner's Brief, although petitioner moved vigorously for reconsideration and review of the padlocking and mass seizure ordered by the trial court, all three of its bookstores remained sealed and padlocked for a full year, until the Indiana Court of Appeals finally granted a stay pending appeal. This Court disapproved far shorter delays in Southeastern Promotions, 420 U.S. at 562 (five months), and Freedman, 380 U.S. at 55 (six months).

The protracted process in this case was permitted by a statute that sets no time limits upon either the adjudication of obscenity or the appellate review of prior restraints. The Indiana Supreme Court upheld the statute because of its assumption that,

absent petitioner's interlocutory appeals, "a full adversarial hearing on the merits of the forfeiture action" would have been held "within a reasonable time." 504 N.E.2d at 567. The court gave no indication as to what it would consider to be "a reasonable time," but the statute itself requires only that a forfeiture action be commenced within 180 days of a seizure; it sets no time limit of any kind for a trial on the merits.

In any event, the padlocking of petitioner's bookstores for a full year pending judicial resolution of the validity of the ex parte seizure order itself violates Freedman, Vance, and Skokie by failing to place a strict limitation on temporary prior restraint of materials presumptively protected by the First Amendment. Petitioner's choice to pursue an interlocutory appeal rather than proceeding to trial on the merits

cannot vitiate the guaranties of Freedman and its progeny; what is guaranteed is not merely a trial on the merits on obscenity, but prompt resolution of the broader question of whether the State has imposed an unconstitutional prior restraint. See Skokie, 432 U.S. at 44.

Finally, even if the procedures governing pretrial seizure and padlocking complied with the mandates of Freedman, the ultimate remedies permitted under the Indiana law would not. Having proven only that two pieces of obscene material were sold or exhibited -- sufficient predicate "racketeering activity" to trigger the statute's remedies -- the State may obtain forfeiture of all material and bar future dissemination of material not yet even in defendant's possession.

These remedies attempt an end-run around Freedman and Vance. No burden is placed upon the State to justify the suppression of future materials, because no showing of any kind is required; upon proof of two violations, all subsequent speech may be barred and all materials forfeited. No adversary judicial determination of the obscenity of these items -- prompt or otherwise -- is ever required. And the prior restraint on future speech, far from being for a minimal "fixed period," is indefinite, indeed possibly permanent. For this additional reason, the Court of Appeals correctly held that the statute was unconstitutional as applied to obscenity. 479 N.E.2d at 596-97.

In short, Indiana's RICO law embodies none of the special procedural safeguards required for the delicate task of

separating protected from unprotected speech. Applying RICO to alleged obscenity unleashes a howitzer where the precision of a scalpel is needed. The blunderbuss procedures of the Indiana law pose a threat to protected speech and should therefore be declared unconstitutional.

III.

THE REMEDIES PROVIDED BY THE INDIANA RICO STATUTE OPERATE AS UNCONSTITUTIONAL PRIOR RESTRAINTS ON PROTECTED SPEECH

The Indiana RICO statute permits the suppression of vast quantities of materials never adjudicated obscene, and therefore amounts to a prior restraint of protected speech. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

Under the Indiana RICO statute, upon finding by a preponderance of the evidence that a defendant has engaged in a "pattern of racketeering activity" -- i.e., selling or exhibiting two obscene items within five years -- a court may order, inter alia, dissolution of the enterprise, suspension or revocation of any licenses or permits, and forfeiture of the corporate charter, and may prohibit defendant from engaging in similar activity in the future. See Ind. Code § 34-4-30.5-2 (1986). Additionally, the county prosecuting attorney "may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2." Ind. Code § 34-4-30.5-3(a) (1986). See 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 561 (Ind. 1987).

The operation and effect of these provisions is to permit state officials -- upon demonstrating that two or more books, video tapes, or other items ultimately found to be obscene have at any time within a five year period been sold or exhibited by a bookstore, video outlet, drug store, or other establishment -- to run the defendant and all other entities constituting the "enterprise" permanently out of business. The impact of these remedies goes far beyond the one-year padlocking provided by most nuisance abatement laws. On the face of the statute, a finding that a bookstore sold two copies of a single book or magazine ultimately found to be obscene would apparently justify an order forfeiting all property used in conducting the "enterprise" and barring the store's owner not only from continuing operation at the present site, but from operating a bookstore anywhere in the jurisdiction.

Whatever the validity of these extraordinary penalties when used to attack drug dealing, illegal gambling, or extortion, they are plainly inappropriate in a First Amendment context, and cannot be used to close an entire bookstore based on a mere finding that two books are obscene. Any such remedy violates the presumption against prior restraints, regardless of what procedural safeguards are employed in adjudicating the predicate offenses.

As this Court observed in Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curiam), "the burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication" because "'a free society prefers to punish the few who abuse rights of speech after they break the law than to

throttle them and all others beforehand.'" Id. at 315-16 & n.13 (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) (emphasis in original)).

Applying this well-settled principle, the overwhelming majority of lower court decisions addressing padlocking, license revocation, or forfeiture as a sanction for obscenity have found these remedies to be unconstitutional prior restraints.[4/] As the Eleventh Circuit

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4/ See, e.g., City of Paducah v. Investment Entertainment, Inc., 791 F.2d 463, 469-70 (6th Cir.) (license revocation), cert. denied, 107 S. Ct. 316 (1986); Gayety Theatres, Inc. v. City of Miami, 719 F.2d 1550, 1550 (11th Cir. 1983) (per curiam) (license revocation); Universal Amusement Co. v. Vance, 587 F.2d 159, 164-66 (5th Cir. 1978) (en banc) (padlocking), aff'd on other grounds, 445 U.S. 308 (1980); General Corp. v. State ex rel. Sweeton, 294 Ala. 657, 666, 320 So. 2d 668, 676 (1975) (padlocking), cert. denied, 425 U.S. 904 (1976); State v. Feld, 155 Ariz. 88, 745 P.2d 146, 154 (Ct. App. 1987) (RICO

(footnote continued)

concluded in holding unconstitutional a one-year license revocation based on a single obscenity finding, "'[T]he City can no more impose such a prior restraint on the plaintiff than could it by ordinance restrain a citizen from speaking in public for one year because the citizen once uttered an obscenity in a public place.'" Gayety Theatres, Inc. v. City of Miami, 719 F.2d 1550, 1552 (11th Cir. 1983) (per curiam) (quoting District Court opinion No. 82-1971-Civ-JE, slip op. at 2-3 (S.D. Fla. Oct. 1, 1982)). The open-ended remedies authorized by the Indiana RICO statute go even further in restraining future, presumptively protected speech.

The Indiana Supreme Court nevertheless upheld the application of this statutory

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forfeiture provisions), cert. denied, 99 L. Ed. 2d 482 (1988).

scheme to obscenity, holding that the state's anti-racketeering purpose rendered irrelevant the statute's impact in a particular case. "The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity." 504 N.E.2d at 565.

But as demonstrated above in Point I, whatever the purpose of the RICO statute, its harsh remedies must be measured for their effect upon protected speech. The remedies provided in the Indiana statute sweep too broadly, and have too drastic and immediate an effect upon presumptively protected speech, to be regarded simply as content-neutral punishments for racketeering activity -- particularly in light of the dim and uncertain line between the prohibited predicate conduct and the far wider range of

protected materials inevitably restrained under the statutory scheme.

The Indiana RICO law goes considerably beyond the padlock sanction upheld in Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S. Ct. 3172 (1986). There, the one-year closure of a bookstore as punishment for permitting prostitution and other sexual misconduct on the premises was held not to be a prior restraint for two reasons:

> First, the order would impose no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of advance determination that the distribution of particular materials is prohibited -- indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

106 S. Ct. at 3177 n.2.

Here, by contrast, the bookseller does not suffer a finite punishment that permits him to carry on his activities elsewhere; instead, he may have his entire inventory seized and forfeited, his license revoked, and his ability to engage in similar activity curtailed or barred by court order. The sanctions relate precisely to "expressive conduct" -- sweeping large quantities of protected expression into a wholesale ban triggered by a couple of properly suppressible items. Moreover, the offense that may bring about the destruction of the bookseller's business is not clearly defined illegal conduct like prostitution or public sexual activity, but the amorphous possibility that a jury may ultimately find two books, magazines, or movies to be obscene. The chilling effect in these circumstances is exponentially greater than in Arcara.

The harsh remedies of the Indiana RICO law more closely resemble the restraint authorized by the nuisance statute struck down in Near v. Minnesota, 283 U.S. 697 (1931). The state in Near sought to justify an injunction against future publication of a scandalous newspaper as a simple punishment for past, unprotected speech. This Court, in an opinion by Chief Justice Hughes, rejected that construction:

> The object of the statute is not punishment in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." Describing the business of publication as a public nuisance, does not obscure the substance of the proceeding which the statute authorizes.

Id. at 711 (quoting State ex rel. Olson v. Guilford, 174 Minn. 457, 462, 219 N.W. 770, 772 (1928)).

The Supreme Court of Indiana similarly sought to justify the restraints imposed by Indiana's RICO law as a necessary new weapon to root out organized crime. 504 N.E.2d at 565. As it did in Near, the Court should look beyond the State's characterization and strike down the Indiana law as an unconstitutional prior restraint.

CONCLUSION

The judgment of the Supreme Court of Indiana should be reversed.

Respectfully submitted,

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No. 87-470

IN THE

Supreme Court of the United States

October Term, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

vs.

STATE OF INDIANA, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Indiana

---

and

RONALD W. SAPPENFIELD, FANTASY ONE, INC., and FANTASY TWO, INC.,

Petitioners,

vs.

STATE OF INDIANA,

Respondent.

On Writ of Certorari to the Court of Appeals of Indiana, First District

---

MOTION OF SPARTACIST LEAGUE AND PARTISAN DEFENSE COMMITTEE FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED

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The Indiana RICO Statute is Unconstitutional In Violation of the First Amendment When Applied Based on Predicate "Obscenity" Offenses

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MOTION OF SPARTACIST LEAGUE AND PARTISAN DEFENSE COMMITTEE FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED.

MOTION OF SPARTACIST LEAGUE AND PARTISAN DEFENSE COMMITTEE, FOR LEAVE TO FILE A BRIEF, AS AMICI CURIAE, IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED.

STATEMENT

The Spartacist League and Partisan Defense Committee hereby respectfully move for leave pursuant to Rule 42 of the Rules of the Supreme Court to file the attached joint brief, amici curiae, in support of the petitioners, Fort Wayne Books, Inc., Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy Two, Inc. Attorneys for petitioners have consented thereto and letters to that effect are filed with this Court; the consent of the attornies for respondents was requested but refused.

THE INTEREST OF AMICI CURIAE

The Spartacist League is a Marxist political organization with a history of over twenty years of activity in the United States, including running candidates for public office, holding classes and public forums on Marxist history, international and domestic politics, and publishes a bi-weekly newspaper, Workers Vanguard, a journal of the Women's Commission, Women and Revoltion, and a theoretical journal, Spartacist.

The Partisan Defense Committee is a class-struggle, non-sectarian legal defense organization in accordance with the political views of the Spartacist League. It gives aid and support to cases and causes in the interest of the whole of the working people.

The Spartacist League seeks to act, as Lenin described the role of the vanguard workers party, as a "tribune of the people." Thus the Spartacist League opposes all aspects of social oppression, whether stemming from race and national hatred or from the repressive sexual morality enforced by the state and bourgeois family.

As materialists, amici curiae understand that attempts today to proscribe sexuality and particular sexual practices (and their depiction in pornography) necessarily reflect the attitudes, values and prejudices shaped by class society.

The Spartacist League has a long-standing position against government regulation of private life. Amici curiae do not advocate any particular sexual practices, but define their position essentially in the negative: against this state's attempts to censor, limit

and cripple human sexual expression in the service of its own reactionary ideology.

The issue presented in these cases is whether the government can criminalize First Amendment communicative materials, seize and destroy them and imprison their distributors--simply by alleging "obscenity". In these cases the government applied the most powerful weapon in its legal arsenal to an area of social concern inseparably connected to humanity's most public and most private worlds--opinion and sex. The current battleground is personal freedoms--focused on the three-letter word "sex." The battle cry of the government and its religious surrogates is the "protection of morality, family, children."

These cases represent government's frontal assault on First Amendment protection of the spoken and written word,

books, films, and the right to publish and distribute communicative material. The starting point is the current majority position of the Supreme Court that the First Amendment in not an absolute--that an "obscenity" exception exists. The established tests for "obscenity" are subjective, imbued with religious considerations, and justified on the basis of a false history of the First Amendment obscenity exception.

Until now, it has been a principle of constitutional law that communicative material is protected by the First Amendment and is not "obscene" until there has been a judicial determination. Even where materials are considered "obscene," due process mandates apply. This is axiomatic, a minimum condition for the First Amendment to have meaning.

The application of RICO provisions to anti-obscenity laws abrogates First

Amendment protection for communicative materials. Under RICO an ex parte ruling of probable cause that two or more individual items are "obscene" can legally justify the seizure of all other First Amendment materials owned by the alleged offender, without a trial or judicial determination. The prosecutor can choose venue in order to best secure initial forfeiture and then conviction.

Thus these cases pose in stark relief whether the First Amendment is fact or fiction; whether by an Orwellian turn of phrase books, magazines, and video movies can be transformed from First Amendment materials to fruits of racketeering.

In view of the foregoing, amici curiae seek leave to file the attached brief.

Respectfully submitted,

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Dated: New York, New York
May 12, 1988

BRIEF OF SPARTACIST LEAGUE AND PARTISAN DEFENSE COMMITTEE, AS AMICI CURIAE, IN SUPPORT OF PETITIONERS.

STATEMENT

The Spartacist League and Partisan Defense Committee submit this brief, amici curiae, in support of the petitioners, Fort Wayne Books, Inc., Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy Two, Inc., having submitted a motion for permission to file same.

INTEREST OF AMICI CURIAE

The Spartacist League is a Marxist political organization with a history of over twenty years of activity in the United States, including running candi-

dates for public office, holding classes and public forums on Marxist history, international and domestic politics, and publishes a bi-weekly newspaper, Workers Vanguard, a journal of the Women's Commission, Women and Revolution, and a theoretical journal, Spartacist.

The Partisan Defense Committee is a class-struggle, non-sectarian legal defense organization in accordance with the political views of the Spartacist League. It gives aid and support to cases and causes in the interest of the whole of the working people.

The Spartacist League seeks to act, as Lenin described the role of the vanguard workers party, as a "tribune of the people." Thus the Spartacist League opposes all aspects of social oppression, whether stemming from race and national hatred or from the repressive sexual mo-

rality enforced by the state and bourgeois family.

Social bigotry, racism and religion are the ideological concomitants of the drive against "godless communism" abroad and blacks, minorities and unions at home. There is a desire by the American rulers to recreate the reactionary environment of the 1950's--the first and last decade of the American century--a period pre-Vietnam, pre-"sexual liberation," pre-civil rights movement and above all pre-American capitalism's loss of world economic and military hegemony.

As Marxists, amici curiae are defenders of democratic rights, recognizing the root cause of the contraction of constitutionally protected rights lies in class nature of the state. Harold Laski explains in his treatise The State in Theory and Practice (1935):

> "...how accidental was the union of capitalism with democracy. It was

the outcome, not of an essential harmony of inner principle, but of that epoch in economic evolution when capitalism was in its phase of expansion. It had conferred political power upon the masses; but it was upon the saving condition that political power should not be utilized to cut at the root of capitalist postulates. It would offer social reforms so long as these did not jeopardize the essential relations of the capitalist system. When they did as occurred in the post-war [World War I] years, the contradiction between capitalism and democracy became the essential institutional feature of Western civilization."

As materialists, amici curiae understand that attempts today to proscribe sexuality and particular sexual practices (and their depiction in pornography) necessarily reflect the attitudes, values and prejudices shaped by this class society. Most prominent is the hypocritical glorification of the monogamous family unit, which Marxists have classically defined as the main Western social institution oppressing women. The "family values" the pornography police claim to

uphold are in fact justification for depriving women of equal status not only in the market place but in relation to their own bodies.

The purported reverence for the family reeks with hypocrisy. Families have been destroyed by waves of deindustrialization, slashing of social programs and all-sided attacks on the trade unions, the poor, blacks, aged and the young. The rallying call of the anti-pornography bigots and Moral Majorities to "save the children" has spawned a five-year witchhunt against day-care centers, desperately needed by working women. Meanwhile enormous suffering has been inflicted on the children of this country--from infancy to adolescence, children are the largest section of the American population hit by the economic austerity enforced by both Republicans and Democrats.

Pre-eminent American novelist and social commentator, Gore Vidal has aptly stated "sex is politics" noting that the

> "sexual attitudes of any given society are the result of political decisions... Today Americans are in a state of terminal hysteria on the subject of sex in general and of homosexuality in particular because the owners of the country regard the family as the last means of control over those who work and consume."
>
> Gore Vidal, "Sex Is Politics," The Second American Revolution (1982).

Those whose private sexual life does not conform to the official values of "Judeo-Christianity" and this capitalist state are subject to heavy penalties, as the decision of this Court upholding sodomy laws in Georgia--which specifically made reference to Biblical tradition--made clear.[1] Censoring sexual expression via video, print or photograph is a continuation of this sex witchhunt.

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[1] Bowers v. Hardwick, __U.S.__, 106 S. Ct. 2841 (1986).

The Spartacist League has a long-standing position against government regulation of private life. As stated in the Spartacist League document Youth, Class and Party (1971), "...we call for an end to all laws against what are known as 'crimes without victims' (e.g., prostitution, pornography, gambling, drug addiction, anti-liquor laws).... Laws against gambling and various sexual practices reflect official puritanism allied to organized religion, which acts as an important ideological pillar of capitalism, convincing the masses there can be no happiness this side of the grave."

The shameful hypocrisy of this system of state-enforced oppression of women is revealed by the existence of prostitution, the inevitable companion of the enforced monogamy of the family. Certainly some pornography reflects the frustrations and hostilities engendered

by this repressive society. Amici curiae do not advocate any particular sexual practices, but define their position essentially in the negative: against this state's attempts to censor, limit and cripple human sexual expression in the service of its own reactionary ideology. This follows the classic Marxist tradition, as expressed by Frederick Engels over one hundred years ago in The Origin of the Family, Private Property and the State (1884):

> "Thus, what can we conjecture at present about the regulation of sex relationships after the impending effacement of capitalist production is, in the main, of a negative character, limited mostly to what will vanish. But what will be added? That will be settled after a new generation has grown up: a generation of men who never in all their lives have had occasion to purchase a woman's surrender either with money or with any other means of social power; and of women who have never been obliged to surrender to any man out of any consideration other than that of real love, or to refrain from giving themselves to their beloved for fear of the economic consequences. Once such people

> appear, they will not care a rap about what we today think they should do. They will establish their own practice and their own public opinion, conformable therewith, on the practice of each individual--and that's the end of it."

People have the right to read or look at whatever they want, to write, paint or film it too, and to engage in whatever sexual practices (or none at all) they choose, so long as they're consensual. The point is neither to proscribe, nor prescribe, what kind of sex people "should" have. As the Marxist historian Isaac Deutscher noted at a 1966 Socialist Scholars Conference:

> "We do not maintain that socialism is going to solve all predicaments of the human race. We are struggling in the first instance with the predicaments that are of man's making and that man can resolve.
>
> "May I remind you that Trotsky, for instance, speaks of three basic tragedies--hunger, sex, and death---besetting man. Hunger is the enemy that Marxism and the modern labor movement have taken on.
>
> "Yes, socialist man will still be pursued by sex and death; but we are

> convinced that he will be better equipped than we are to cope even with these.... We do not see in socialist man evolution's last and perfect product, or the end of history, but in a sense only the beginning of history."

For the reasons set forth above the Spartacist League and Partisan Defense Committee are compelled to submit this Brief Amici Curiae in support of the petitioners.

STATEMENT OF CASE

The issue presented in these cases is whether the government can criminalize First Amendment communicative materials, seize and destroy them and imprison their distributors--simply by alleging "obscenity". That is what the State of Indiana did do, and what the federal government intends by making "obscenity" a predicate offense under RICO[2]. In these cases the

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[2] Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. sec. 1961, et seq., particularly the

government applied the most powerful weapon in its legal arsenal to an area of social concern inseparably connected to humanity's most public and most private worlds--opinion and sex. The case does not come before this Court without history or context.[3] There is a call to arms against constitutional rights. The current battleground is personal freedoms--focused on the three-letter word "sex." The battle cry of the government and its religious surrogates is the "pro-

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forfeiture provisions of sec. 1963. In 1984, Congress amended section 1961 (1) to include obscenity offenses in the definition of racketeering activity. The Indiana RICO statute is modeled after the Federal RICO statute and is similar to the RICO statutes in many other cases.

[3] The Attorney General's Commission of Pornography, Final Report, July 1986, made 93 recommendations including targeting cable and satellite TV for obscenity prosecutions, using RICO laws to prosecute and seize the assets of obscenity targets, and most ominously calling for the creation of private groups to challenge most communicative materials from erotic magazines to videotapes.

tection of morality, family, children."

These cases represent government's frontal assault on First Amendment protection of the spoken and written word, books, films, and the right to publish and distribute communicative material. The starting point is the current majority position of the Supreme Court that the First Amendment in not an absolute--that an "obscenity" exception exists. The established tests for "obscenity" are subjective, imbued with religious considerations, and justified on the basis of a false history of the First Amendment obscenity exception.

Until now, it has been a principle of constitutional law that communicative material is protected by the First Amendment and is not "obscene" until there has been a judicial determination. Even where materials are considered "obscene," due process mandates apply. This is

axiomatic, a minimum condition for the First Amendment to have meaning.

The application of RICO provisions to anti-obscenity laws abrogates First Amendment protection for communicative materials. Under RICO an ex parte ruling of probable cause that two or more individual items are "obscene" can legally justify the seizure of all other First Amendment materials owned by the alleged offender, without a trial or judicial determination. The prosecutor can choose venue in order to best secure initial forfeiture and then conviction.

Thus these cases pose in stark relief whether the First Amendment is fact or fiction; whether by an Orwellian turn of phrase books, magazines, and video movies can be transformed from First Amendment materials to fruits of racketeering.

LEGAL ARGUMENT

THE INDIANA RICO STATUTE IS UNCONSTITUTIONAL IN VIOLATION OF THE FIRST AMENDMENT WHEN APPLIED BASED ON PREDICATE "OBSCENITY" OFFENSES

The First Amendment rights are intertwined and indivisible, part of a whole. The First Amendment encapsulates the philosophy of the enlightenment in opposition to the philosophy of obscurantism, the breaking of feudal fetters on political freedom, economic freedom, religious freedom and scientific freedom.

The First Amendment is a unified totality, the "text is indeed both general and absolute. In one sentence it separates church and state and guarantees free opinion." [4]

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[4] Franklin, "Infamy and Constitutional Civil Liberties," Lawyers Guild Review, Vol. XIV, No. 1, p. 3 (1954)

"The First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom," Mr. Justice Black, dissenting in Dennis v. United States, 341 U.S. 494, 580 (1951).

The First Amendment is unified in its various clauses by the central liberty of freedom of the individual in matters of thought and conscience--whether the concerns are political, religious or social.[5] The legal force of the

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[5] In Prince v. Massachusetts, 321 U.S. 158, 164 (1944), the Court wrote: "If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. Schneider v. State, 308 U.S. 147; Cantwell v. Connecticut, 310 U.S. 296. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. but they have unity in the charter's prime place because they have unity in their human sources and

First Amendment applied only to the federal government until the battlefields of the Civil War, defeating slavery, provided the basis for a national American state. Legally this was codified in the Reconstruction Amendments, the Thirteen, Fourteenth and Fifteenth Amendments to the U.S. Constitution, subordinating subordinating the state governments to these democratic principles. See, Gitlow v. New York, 268 U.S. 652 (1925), Cantwell v. Connecticut, 310 U.S. 296 (1940).

Constitutional history discloses that particularly when the populace is being prepared for war, the protections

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functioning." See also, Widmar v. Vincent, 454 U.S. 263, 268 (1981), Wallace v.Jaffee, 472 U.S. (1985). "The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legitimate province of government." Board of Education v. Minor 23 Ohio St 211,253 (1872) quoted approvingly in Abington School District v. Schempp, 374 U.S. 215, n 7 (1963).

of the First Amendment are ignored.[6] And, in the midst of a national hysteria around AIDS, in Bowers v. Hardwick, __U.S.__, 106 S. Ct. 2841 (1986) this Court upheld Georgia's sodomy law, crimi-

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[6] The Bill of Rights was less than a decade old in 1798 when war hysteria prompted the Federalist-dominated Congress to enact the Alien and Sedition Acts. Constitutional challenges to the Acts were generally precluded in the federal courts. During World War I, the Espionage Act of 1917 and the Sedition Act of 1918 were passed and then upheld by the Supreme Court in Schenck v. United States, 249 U.S. 47 (1919). In 1940 Congress, concerned with the increased possibility of United States entry into World War II, passed the Alien Registration Act (better known as the Smith Act). The first to be prosecuted were the Trotskyists of the Socialist Workers Party. The convictions for conspiring to overthrow the government by force and violence were affirmed by the Court of Appeals, Dunne v. United States, 138 F2d 137; 320 U.S. 790 (1943), and the Supreme Court refused review. The internment of American citizens of Japanese descent during World War II, Korematsu v. United States, 320 U.S. 214 (1944) is a notorious example. Post-World War II, during the McCarthy anti-communist witchhunts, members of the Communist Party were convicted under the Smith Act, Dennis v. United States, 341 U.S. 494 (1951).

nalizing particular sex acts between consenting adults, homosexuals and heterosexuals alike, in the privacy of home.

However, judicial claims that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance,"[7] are simply and clearly erroneous. There is no judicial precedent from British common law or the new American republic regarding prosecution of obscenity. There is no evidence the founding fathers ever considered sexually obscene speech or writings an offense. Reported common law prosecutions were based not on concerns of sexual improprieties but political and religious themes, particu-

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[7] Roth v. United States, 354 U.S. 476, 484 (1957) and cases cited therein at pps. 481-485; Miller v. California, 413 U.S. 15, 20 (1973).

larly an attack on the state religion.[8] The earliest licensing systems begun by Henry VII in 1538 were primarily addressed to the vices of sedition and heresy.[9] The eighteenth-century decisions generally relied on as the basis of our obscenity prosecutions instead establish the political nature of these cases.[10]

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[8] In Schroeder, "Obscene Literature at Common Law," 69 Albany L.J. 146 (1907) it is argued that, "Since England had an established church, naturally anything (including the so-called obscene publications) which discredited the official religion would also be held libelous...From the suppression of 'obscene impiety,' has erroneously grown the notion that all so-called 'obscene' literature was suppressed at common law."

[9] See, generally Alshuler, "Origins of the Law of Obscenity," in 2 Technical Report of the Commission on Obscenity and Pornography 65 (1970).

[10] See, Reynolds, "Our Misplaced Reliance on Early Obscenity Cases." 61 A.B.A.J. 220, 222 (1975). "Obscenity was not viewed by the courts as terribly serious matter. Sedley's [Sir Charles Sydles Case, 1 Keble 620, 1663] true offense was breach of the peace and inciting a riot [Sedley disrobed, harangued his audience with antireligious epithets as he showered them with bottles

At the time of the American Revolution there was no common law obscenity and only one state had any statutory law and that was most likely directed against religious blashemy.[11] With that excep-

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of urine]. Curll [Dominus Rex v. Curl, 2 Strange 788, 1727] had antagonized the government, and Wilkes [4 Burr. 2527, 1770] was first on the cabinet's list of political enemies. Read, the only defendant whose case involved simply a vulgar book, was acquitted in the higher court. The chief offender in this literature, Fanny Hill, had great vogue and was not prosecuted....Although the three affirmed convictions were political, our courts have overlooked that and have considered them the foundation of obscenity prosecutions. The basis of Read's acquittal is that no one was hurt and the peace was not broken. The 1970 obscenity commission returned to that viewpoint, seeing no harm in the distribution of sexual materials among consenting adults. The judges in the Read case said the offense, if any, was spiritual, not temporal. Of course, we have no ecclesiastical courts, but as to Fanny Hill, the commission would advise, in effect, as does the ghost concerning Hamlet's mother: 'Leave her to heaven.'"

[11] In 1711, Massachusetts had a censorship system which included the "wicked, profane, impure, filthy and obscene..." Ancient Charter, Colony Laws

tion, at the time of the adoption of the Constitution and Bill of Rights, the states had no law excluding "obscenity" from the regime of freedom of expression and press that then existed. Thus, in the words of Mr. Justice Douglas "the creation of the 'obscenity' exception to the First Amendment was a legislative and judicial tour de force."[12]

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and Province Laws of Massachusetts Bay, 1814. See, Schroeder, supra, at 149, "A further confirmation of our conclusion that the common law of England and America knew of no such crime as circulating obscene literature except when it was of the particular kind which directly discredits religion, we may point to the law-book writers of the time, who uniformly classified it as an offense against God, not at all as one of any other direct consequences to the civil order. With the creation of our secular commonwealths, wherein a union of church and state is forbidden, our constitutions have repealed all the common law offenses against God. Writers such as Blackstone make no mention of such an offense except as an offense against God."

12 Paris Adult Theatre I v. Sloan, 113 U.S. 49, 70-71, (1973) (Douglas, J., dissenting). See, Goebel, Development of Legal Institutions (1946).

Furthermore, the First Amendment was, until the adoption of the Fourteenth Amendment, a restraint only upon federal power. There is an absence of any federal cases or laws relative to obscenity in the period immediately after the adoption of the First Amendment.

Criminalization of purportedly obscene writings has significantly peaked at key periods of social change. Only four states made obscenity the object of the criminal law prior to the Civil War, and a federal customs law aimed at the French post card trade was passed in 1842 which excluded printed matter from regulation. These statues were not rigidly enforced. In 1821 a Massachusetts bookdealer was sentenced to six months in jail for selling Fanny Hill to local farmers. The few obscenity cases prosecuted between 1821 and 1870 were general-

ly guides to marital sex containing contraceptive information.

It was not until the period of post-Reconstruction reaction that Congress passed legislation relating to obscenity. After the Civil War, mass printing, literacy, second-class postal rates, combined with the presence of single men living outside family supervision in the cities provided a market for sexual commerce. "An Act for the Suppression of Trade in, and Circulation of Obscene Literature and Articles of Immoral Use," had as its object the specific prohibition of advertising and mailing of birth control information.[13]

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[13] This Act, 17 Stat 599 (1873), was promulgated by one Anthony Comstock who personally supervised its enforcement as an unpaid postal inspector. In 1875 alone he led forty-seven arrests, twenty-eight convictions and ninety-one hundred fines. Comstock destroyed something over fifty tons of vile books [and] 3,984,063 obscene pictures. It took the concerted campaign of Margaret Sanger to make birth control information available to women to

As late as 1948, the Court could say that many state obscenity statutes had "lain dormant for decades." Winters v. New York, 333 U.S. 507, 511 (1948). It was not until 1957 in Roth v. United States, 354 U.S. 476 (1957) that the issue "whether obscenity is utterance within the area of protected speech and press" was "squarely presented" to this Court.

In Roth this Court held that certain expression is "obscene" and thus outside the protection of the First Amendment while upholding individual books, such as classics like Fanny Hill, as not being "obscene."[14] Post World War II, Cold War politics found expression in sexual poli-

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defeat Comstock and his cronies in the Societies for the Suppression of Vice, Women's Christian Temperance Union, and the YMCA, forty years later.

[14] Memoirs v. Massachusetts, 383 U.S. 413 (1966).

tics--preoccupation with family stability, "internal subversion," "moral fiber" and "decency." The focus of the Courts turned to commercial distribution of allegedly obscene materials--books, magazines, and more recently video movies.

This Court has not found it possible to arrive at an objective legal standard of obscenity. The court established standards are imbued with religious, moral and subjective literary determinations. From the initial formulation defining "obscenity" in Roth v. United States, supra[15] until this Court's decision in Miller v. California, 413 U.S. 15 (1973), no majority of the Supreme Court has at any given time been able to agree

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[15] The standard as stated in Roth v. United States, supra, 489 in the opinion written by Mr. Justice Brennan was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power and excepted from the protection of the First Amendment.[16] See, e.g., Redrup v. New York, 386 U.S. 767, at 770-771 (1969).

The "test" set forth in Miller, supra, at 24 is a three-part guideline for the trier of fact: (a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a

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[16] As set forth in Miller, supra, at p. 18-19, this Court has defined "obscene material" as "material which deals with sex in a manner appealing to prurient interest," Roth v. United States, supra,

whole, lacks serious literary, artistic, political, or scientific value."

The absolute failure of the Court established obscenity tests, was addressed by Mr. Justice Brennan dissenting in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 84 (1972):

> "Any effort to draw a constitutionally acceptable boundary on state power must resort of such indefinite concepts as 'purient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the person defining them. Although we have assumed that obscenity does exist and that we 'know it when [we] see it,' Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between the protected and unprotected speech."
>
> "Recognizing that 'freedoms of expression . . .are vulnerable to gravely damaging yet barely visible encroachment,' Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 66 (1963), we have demanded that 'sensitive tools' be used to carry out the 'separation of legitimate from illegitimate speech.' Speiser v. Randall, 357 U.S. 513. 525 (1958). The essence of our problem in the obsce-

nity area is that we have been unable to provide 'sensitive tools' to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into the suppression of the latter. The attempt, as the late Mr. Justice Harlan observed, has only 'produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704-705 (1968) (Separate opinion).

"These considerations suggest that no one definition, no matter how precisely or narrowly drawn, can possibly suffice for all situations, or carve out fully suppressible expression from all media without also creating a substantial risk of encroachment upon the guarantees of the Due Process Clause and the First Amendment." Id. at 79-80.

Contrary to the protestations and assertions of the Court that the "States have the power to make a morally neutral judgement" and to criminalize obscenity, Id. at 69, the protection of public de-

cency concept is at bottom religious.[17]

Religious beliefs and determinations of morality cannot dictate what is permissible for man to read, think, fantasize--be it the classics or "smut"; erotica or pornography. Absent physical harm to another, It is no concern of the

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[17] See, Henkin, "Morals and the Constitution: The Sin of Obscenity," 63 Col.L.Rev.391, 392-395 (1963) where it is argued that obscenity laws are not based on any concern for the prevention of sex offenses or other forms of crime, but are "rooted in this country's religious antecedents, of governmental responsibility for communal and individual decency and morality....Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the `consumer'. Obscenity, at bottom, is not crime. Obscenity is sin."

state. Established First Amendment law does not permit religious or moral determination of "public consensus." West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959) First Amendment protection is "not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax."; Wooley v. Maynard, 430 U.S. 705, 714-15 (1977) that "most individuals agree with the thrust of New Hampshire's motto is not the test; ... [t]he First Amendment

protects the right of individuals to hold a point of view different from the majority and to refuse to foster... an idea they find morally objectionable."

Nor do First Amendment protections depend on whether some majority (or vociferous minority's) concept of "social worth" or "seriousness," Gooding v. Wilson, 405 U.S. 518 (1972), Cohen v. California, 403 U.S. 15 (1971), Terminello v. Chicago, 337 U.S. 1 (1949). "The Constitution protects the right to receive information and ideas," and that "[t]his right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." Stanley v. Georgia, 394 U.S. 557, at 564 (1969). See Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Winters v. New York, supra at 510; Lamont v. Postmaster General, 381 U.S. 301, 307-308 (1965) (concurring opinion).

This right is closely tied, as Stanley recognized, to "the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy." 394 U.S., at 564. It is similarly related to "right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (italics omitted), Eisenstadt v. Baird, 405 U.S. 438, 453 (1972), and the right to exercise "autonomous control over the development and expression of one's intellect, interests, tastes, and personality." (Italics omitted.) Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas J., concurring).

There is a right of privacy or liberty in matters related to marriage, family and sex. Griswold v. Connecticut, 321 U.S. 479 (1965), Loring v. Virginia,

388 U.S. 1 (1967), Skinner v. Oklahoma,

316 U.S. 535 (1942).

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They conferred, as against the Government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J.,dissenting).

These established premises of individual liberty provide the basis that the state can not assert a right to protect the individual from the effects of obscenity. The state's criminalization of what it considers to be obscenity amounts to nothing more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the mandate of the First Amendment.

Moreover, this Court has further left the question of what constitutes obscenity undefinable because the community standard to be applied is not an objective, national one but intended to vary from community to community. In the words of this Court there should not be "fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive"... It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City, Miller v. California, supra, at 30, 32. Thus prior to judicial determination what is purportedly obscene or not is cannot be known.

Obscenity is a wholly improper predicate RICO offense. The mere allegation that communicative material is obscene

starts the process of the draconian RICO punishment and forfeiture scheme, allowing First Amendment materials not even alleged to be proscribed to be seized. RICO, therefore comprises a constitutionally impermissible prior restraint of protected First Amendment materials. Any system of prior restraints of expression bears a heavy presumption against its constitutional validity. It is tolerated only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint, Near v. Minnesota, 283 U.S. 691, 720-721 (1931).

RICO sanctions violate longstanding constitutional solicitude for sexually explicit expression that does not fall into the circumscribed category, Jenkins v. Georgia, 418 U.S. 153 (1974). When seeking to restrict the dissemination of

unprotected obscenity, government "is not free to adopt whatever procedure it pleases without regard to the possible consequences for constitutionally protected speech," Marcus v. Property Search Warrant, 367 U.S. 717, 731 (1961).

The Supreme Court has repeatedly stressed that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished, is finely drawn. ... The separation of legitimate from illegitimate speech calls for...sensitive tools," Speiser v. Randall, 357 U.S. 513, 525 (1969). The First Amendment principle applies with particular force when government regulates obscenity. "[C]onstitutionally protected expression...is often separated from obscenity only by a dim and uncertain line," Bantam Books v. Sullivan, 372 U.S. 58,66 (1963). Given this indeterminacy, a statutory scheme,

such as RICO, drawn without appropriate precision and sensitivity to First Amendment principles risks punishing and deterring a substantial range of protected expression. RICO is a mallet, not the "sensitive tool" required by this Court.

In evaluating the extent to which a particular regulation will "chill" protected expression, the Supreme Court has directed courts to consider the precision with which the government has defined the proscription. Ambiguous or sweeping proscriptions will cause potential speakers to self-censor out of inability to determine what expression will lead to official sanction. Speiser v. Randall, supra; Thomas v. Collins, 323 U.S. 526, 535 (1945). The Supreme Court has also directed courts to consider the severity of punishment imposed for transgressing the prohibition, New York v. Ferber, 458

U.S. 747, 774 (1982). Punishment chills more as it becomes more severe.

These well-established principles require invalidation of the RICO statute as applied based on obscenity crimes. RICO is certain to chill a vast amount of constitutionally protected expression. The statutory scheme is both vague in the scope of its proscriptions and draconian in the severity of its punishments.

Because only a "dim line" separates obscenity from protected expression, obscenity regulation necessarily imposes uncertainty upon potential speakers. Miller v. California, supra explicitly incorporates variable local community standards in the determination whether material is determined obscene. But the scope of RICO's definition of "pattern of racketeering activity" compounds the uncertainty exponentially. RICO's nationwide scope poses grave dangers for an

entity engaged in nationwide distribution of materials containing some sexual content. Expression that the vast majority of communities would consider appropriate might nonetheless be found to be obscene in one or two communities. Under RICO, two such findings of obscenity subject the distributor to criminal liability that includes forfeiture of the entire nationwide business. Moreover, there is no way to discern or predict reliably the standards of small communities in distant parts of a state or the country. RICO places power in the hands of local prosecutors far in excess of that traditionally given in the evolved law of obscenity. "Just as ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of a work vary from community to community based on the degree of local acceptance

it has won." Pope v. Illinois, 107 S.Ct. 1918,1921 (1987).

The severity of RICO's punishment scheme also exerts a powerful chilling effect. The RICO forfeiture provision taints the income received from all sexually explicit expression, because two isolated examples of that expression might later be found to be "obscene" in a single community anywhere in the state or country. Any person who derives income from the proceeds of such expression is at risk not only of prolonged imprisonment and huge fines, but also the forfeiture of his entire enterprise, if that enterprise either received such proceeds, or was involved in the production, transportation, or dissemination of the expression.

Either the scope of the proscription or the severity of the punishment alone imposes a sufficient chill on free ex-

pression to require invalidation of the statute. In RICO, however, the two effects merge. A potential speaker must confront not only the indeterminacy of RICO's substantive scope but also the daunting risk of draconian penalties, including forfeiture of virtually all assets if the speaker errs in estimating what speech will fall on the protected side of the First Amendment line. Unlike those who engage in other activities targeted by RICO, the distributor of such materials in all likelihood is engaging in activity he not only deems not illegal, but in fact protected by the First Amendment. Notwithstanding, based upon the prejudices of local prosecutors, and without benefit of a full judicial determination, RICO paints such distributor with the brush of "racketeering" and the full brunt of its draconian sanctions.

The application of RICO to obscenity will thus have a chilling effect on protected expression unprecedented in its breadth. For all the reasons set forth above, this Court should therefore declare the extension of RICO to obscenity crimes unconstitutional.

Dated: New York, New York
May 12, 1988

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

v.

STATE OF INDIANA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

RONALD W. SAPPENFIELD, ET AL.,

Petitioners,

v.

STATE OF INDIANA

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT

BRIEF OF MORALITY IN MEDIA, INC. AS *AMICUS CURIAE*

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SUPREME COURT OF THE UNITED STATES

October Term, 1987

Fort Wayne Books, Inc.,

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State of Indiana, Et Al.,

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BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE

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INTEREST OF AMICI

Morality In Media, Inc., as Amicus Curiae, files this brief in this case which is before this honorable Court on the merits, under the provisions of Rule 42(2). The written consents of the petitioners and respondents have been requested and all parties have consented in writing. Copies of these consents are being filed with this Court concurrently with this brief.

Morality In Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States. This organization, now national in scope, has affiliates in six states and Puerto Rico. Its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. Its national headquarters is located at 475 Riverside Drive, New York, New York 10115.

The Founder and President of Morality In Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography." The "Hill-Link Minority Report" was cited by this honorable Court in Kaplan v. California, 413 U.S. 115, 120 note 4 (1973) and in Paris Adult Theatre I v. Slaton, 413 U.S. 49 at 58, notes 7 and 8 (1973).

More recently Morality In Media has participated as Amicus in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978); New York v. Ferber, 458 U. S. 747 (1982) and Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985).

Morality In Media is filing a brief in this matter because it believes that the decision in these cases will have a direct effect not only

on state RICO statutes but on the Federal RICO statute to which the crime of dealing in obscene matter was added in 1984 as a predicate crime at the request of Morality In Media. The recent case of United States v. Pryba, 674 F.Supp. at 1504 (E.D. Va. 1987) upheld the new federal obscenity RICO law.

It is the belief of Morality In Media that its brief contains arguments that will not be advanced by the parties.

SUMMARY OF ARGUMENT

Morality In Media contends that the mere fact that the "enterprise" involves a so-called "First Amendment Business" which can under Indiana law be forfeited or dissolved does not invalidate RICO laws that include obscenity as a predicate offense. If this were not the law, then a criminal's so-called "First Amendment" business and corporation would be insulated from RICO laws entirely no matter what the predicate crime.[1] Morality In Media, Inc. contends that a sole proprietor of a "First Amendment" business can be incarcerated for long periods of time under existing Federal and State obscenity laws effectively precluding him or her from

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1. This honorable Court denied certiorari at 459 U.S. 825 (1982) to United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979) aff'd. 665 F.2d 616 (11th Cir. 1982) where the enterprise had as its purpose a "pornography business."

engaging in that First Amendment business.[2] Amicus further points out that the RICO laws are on the books not as a restraint on future First Amendment activity but as a form of punishment for engaging in a past "pattern" of racketeering activity.[3] Amicus further demonstrates that analogous decisions of this Honorable Court may be viewed as precedents for upholding the Indiana RICO statute. Finally Amicus demonstrates the inapplicability of Vance, Marcus, Books, Freedman and Heller.

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2. Cf., Arcara v. Cloud Books, Inc. 106 S. Ct. 3172, 3177 (1986) where this Court said "A thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed."

3. Cf., State ex rel Kidwell v. U.S. Marketing, Inc., 631 P.2d 622 at 628, (Idaho Sup. Ct. 1981) appeal dismissed pursuant to Rule 53, 455 U.S. 1009 (1982).

ARGUMENT

I

THE INDIANA RICO LAWS DO NOT AMOUNT TO A PRIOR RESTAINT OF PROTECTED EXPRESSION ARE NOT OVERBROAD AND ARE NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

The issue of the legality of a "prior restraint" reached this honorable Court in the landmark case of Near v. Minnesota, 283 U.S. 697 707-708 (1931). On that issue that Court said:

> "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment.... In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of the sovereign power must always be determined with appropriate regard to the particular subject of its exercise.... Liberty of speech, and of the press, is also not an absolute right, and the State may punish its

abuse."

The Court continues at 283 U.S. 713:

"In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone:

'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no <u>previous</u> restraints upon publication' (Emphasis Is The Court's) 'and <u>not in freedom from censure for criminal matter when published.</u>' (Emphasis Supplied). 'Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he

> publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.'"

The Near Court continuing at 283 U.S. 714, 715 quotes Patterson v. Colorado,[4]

> 'The main purpose of such constitutional provisions is "to prevent all such previous restraints upon publications" as have been practiced by other governments" (Emphasis in Original) and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.' (Emphasis Supplied).

The Court continues at 283 U.S. 716;

> "The protection even as to previous restraint is not absolutely unlimited...the primary requirements of decency may be enforced against obscene publications." (Emphasis Added).

It is interesting to note that Justice

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4. 205 U.S. 454 at 462 (1907).

Butler, with whom Justices Van Devanter, McReynolds and Sutherland concur[5] states that the majority opinion;

> "Seems to concede that under clause (a) of the Minnesota law the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance."

It should be observed that the Indiana Rico law (34-4-30.5-2) permits the Court, after a defendant is found guilty of violating RICO, to:

(a) Require him to divest himself of any interest in the enterprise.
(b) Prohibit the defendant from engaging in the same type of endeavor.
(c) Dissolve or re-organize the enterprise.
(d) Order forfeiture of the charter.

Now none of these actions amount to a prior restraint, but are designed as punishment for

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5. 283 U.S. at 737.

past offenses. Contrary to the censorship decried in Near v. Minnesota there is no administrative or legislative[6] prior restraint upon any particular publication nor is there any particular subsequent restraint of any particular publication. What the Indiana law says is that "You, Mr. Defendant, (individual or corporation) may not engage further in this enterprise because you have prostituted it and turned it into a criminal activity." The statute, of course, as distinguished from the Near case situation, is "content neutral" relating to the predicate crimes which may trigger its remedies. It is not a statute that refers to the suppression of a newspaper or periodical, but "punishment in the ordinary sense" (cf., Near at 711 and 715). If we examine all of the Indiana civil RICO

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6. The dissenting Justices in Near argued that the doctrine of prior restraint, as it came to us from England and in the Blackstone quotation, supra, was restricted to Administrative prior restraint (283 U.S. 733).

remedies we find that in operation and effect no prior restraint is accomplished. The mere fact that the Defendant may be required to "divest" his interest or be "prohibited from engaging in the same type of endeavor" does not mean that one issue of a publication will be suppressed nor that the enterprise, if engaged in the distribution of publications, will miss a single sale. All that these provisions mean is that some one else may own the enterprise and the assets and the means of publication or distribution--not that the public will be deprived of access to the sentiments therein expressed, (even incidently if the subsequent issue published or distributed is obscene). The same outcome would prevail if the enterprise were reorganized. If it were dissolved, the assets would be sold and publication could continue. The same, of course, is also true if the extreme remedy of charter forfeiture were invoked. It is noted that the statute requires

that the rights of all innocent persons involved in any way in or with the "enterprise" be protected.

The RICO statute also provides for forfeiture of property to the state as a punishment for RICO violations. Again, it should be noted, that the intent of the statute appears to be that except for property that has no value that the assets seized be sold to another party--In such a case the so-called "First Amendment" business may continue,albeit with different <u>persons</u> at the helm. We judge this to be the intent of Section 34-4-30-5.-3 by reason of the language "The court...shall specify the manner of disposition of the property including the manner of disposition <u>if the property is not transferable for value</u>" (Emphasis Added).

It goes without saying that the Criminal RICO provisions under 35-45-6.2 do not exert a prior restraint. It is the typical "after the fact" punishment that this honorable Court has

traditionally held not to be a prior restraint. In summary, the Civil and Criminal Indiana RICO laws are designed to and have the effect of "punishing people" not "putting a business out of businesss" especially if it can be utilized for legitimate purposes. Of course, items found in the RICO case to be obscene become contraband subject to destruction, but all of the balance of the "First Amendment" material is presumed to be nonobscene as well as all projectors, publication, printing and distribution facilities and may be sold or transferred to new "owners."

It is also significant to note that Near v. Minnesota majority opinion, as interpreted by the dissenting justices, apparently excepted enjoining a nuisance from the concept of prior restraint— "The business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance"[7]," Near also puts on a

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7. Note 5, supra

par "enforcing concepts of decency against obscene publications" with the right of the government "to prevent actual obstruction of its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[8]

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8. 283 U.S. 716

II

WHERE SUFFICIENT REASON EXISTS THE CLOSURE OF A FIRST AMENDMENT BUSINESS HAS BEEN AUTHORIZED BY THIS HONORABLE COURT AND OTHER COURTS.

There is no legal principle established in law that prevents the closing of a so-called "First Amendment" business. The law does not surround such a business with an impregnable shield. The Fourteenth Amendment which provides that no state shall deprive any person of liberty without due process of law is not violated by a carefully tailored law designed to punish persons who abuse that liberty. As was said in Near v. Minnesota:

> "In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare is necessarily admitted." (283 U.S. 707) "It is recognized that punishment for the abuse of the liberty afforded to the press is essential to the protection of the public." (Emphasis added) (283 U.S. 715).

In Arcara v. Cloud Books, Inc., 106 S.Ct. 3172, 3177 (1986) this honorable Court stated:

> "We must reject the Court of Appeals' reasoning, analogizing the closure order sought in this case to an unconstitutional prior restraint under Near v. Minnesota.... The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another location even if such locations are difficult to find.[9] Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is

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9. The implication of this honorable Court here is that the First Amendment is not offended even if it takes a while to find a new location. This argues for sustaining the Indiana RICO statute even though the transfer of the business to a new owner through the process of dissolution, reorganization or sale after forfeiture takes some time. This action was taken over the objection of the dissenting judges to the effect that "The Court improperly attempts to shift to the bookseller the responsibility of finding an alternative site" (106 S.Ct. 3180).

prohibited--indeed the imposition of the closure order has nothing to do with any expressive conduct at all."

There are similarities between Arcara and the cases at bar. Pending determination of the validity of the charges the defendants were free to carry on their adult book store activities at other locations especially if "new" money were utilized (except perhaps the fear that they might be arrested) but those arrests (either for obscenity or RICO violations) would not occur (or could be adequately defended) if the new locations avoided violating the law and in particular the Indiana Obscenity Law. The cases also fall squarely into the second Arcara test (which by itself is sufficient to rebut a claim of prior restraint) in that the seizure and forfeiture and the RICO statute are "content neutral" and the determination for seizure and forfeiture was not imposed "on the basis of an advance determination that the distribution of particular materials is

prohibited." As the Indiana Supreme Court said below; "It is irrelevant whether assets acquired through racketeering activity are obscene or not." (504 N.E.2d 564) (Emphasis Supplied).

We also draw the attention of the Court to Avenue Book Store v. City of Tallmadge[10] where this honorable Court denied certiorari to the Ohio Court of Appeals in 1981 over the stated objections of dissenting Justices. In that case, the Ohio Court of Appeals stated that:

> "Defendant is enjoined from utilizing the rear section of the store for the exhibition, display or sale of materials which display or depict sexual conduct (activity) that is obscene."

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10. 459 U.S. 997 (1982) . In Avenue Book the Ohio Court held that the injuction did not "carry with it any of the dangers of a censorship system." It said it did not constitute a prior restraint because" no punishment will be imposed until it is proven that obscene material was indeed involved." (459 U.S. at 997-998). (See also the outline of cases on both sides involving padlocking outlined in the Dissent in that case at 998-999).

Other cases involving First Amendment businesses where the state action was upheld include Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82 (1975) dismissing an appeal from the Ohio Supreme Court 307 N.E.2d 911 (1974) ruling that a one year theatre closure provision was valid. The United States Supreme Court dismissed the appeal "For want of a substantial federal question."[11]

Young v. American Mini Theatres,[12] held that zoning laws on adult entertainment businesses do not constitute impermissible prior restraints noting that there is "No claim that...the viewing public is unable to satisfy its appetite for sexually explicit fare. ...the market for this commodity is essentially unrestrained."

There are lower court cases that

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11. Under Hicks v. Miranda, 422 U.S. 332 (1975) such a dismissal is a ruling "On the Merits."

12. 427 U.S. 50, 62 (1976).

recognize that "padlocking" of a motion picture theater is not an invidious prior restraint. A leading case is State ex rel Kidwell v. U.S. Marketing, Inc., 631 P.2d 622 (Idaho Supreme Court 1981) (appeal dismissed under Rule 53) 455 U.S. 1009 (1982). The opinion of the Idaho Supreme Court in that case, in which a one year padlock was imposed, is especially enlightening and applicable. The Court said at 631 P.2d 626:

> "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. ...What is needed is a pragmatic assessment of its operation in particular circumstances.... Kingsley Books v. Brown, 354 U.S. at 441-42."

Continuing at 627:

> "By way of example, if a bookseller, having fallen behind on his property taxes, loses his bookstore at a tax sale, he will not be heard to complain that the state has imposed an unlawful prior

> restraint on his bookselling activities. If that same bookseller is convicted of a crime of distributing obscene materials, he may be imprisoned, and yet he will not be heard to complain that his incarceration constitutes a prior restraint upon his ability to disseminate protected speech, even though it is quite clear that it will have that effect" (Emphasis Added).[13]

The Idaho Court continues at 627:

> "There are a number of distinctions between the Near case and the previously cited hypothetical examples, not the least of which is the fact that Near dealt with speech critical of public officials rather than speech of a sexual nature. Most significantly, however, the Near

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13. The point here is that while in "operation and effect" the incarceration deprives the defendant of the ability to conduct a First Amendment business, it is, in "operation and effect" not a restraint of First Amendment activities. It is a restraint on the defendant's participation therein. This distinction is dispositive of the present case.

injunction against prospective publication was based on the content of such publication" (Emphasis Added). "In the case of tax sales and imprisonment for violation of criminal obscenity statutes, the incidental restraint on future expression is not based on the content of that expression" (Emphasis Added).

At page 627, footnote 8, the Idaho court (citing cases) states:

> "The typical prior restraint case deals with the government's effort to censor future expression based on its content."

It then, at page 628, goes on to say;

> "The one-year forfeiture provision of the Idaho moral nuisance statute avoids the particular noxious specter of content control. Like a tax sale, the forfeiture is directed strictly against property, apart from the content of any expression contained therein. And like imprisonment for a criminal obscenity transgression, the forfeiture is intended to penalize

past distributions of illegal and unprotected obscenity. The legislature could just as easily have imposed a fine or other property-related penalty. Instead the legislature chose to punish the violator by temporarily depriving him of the property which was used in committing the violation."[14]

The Idaho Court, at page 628, then gives us the rationale for forfeiture statutes as follows:

"The purpose of statutory forfeitures is obvious: to punish and to deter...forfeitures punish 'by imposing an economic penalty thereby rendering illegal behavior

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14. "The state's authority to impose property related sanctions in civil actions is well-established...the most prevalent example of this type of in rem activity can be found in statutes imposing forfeitures upon vehicles and vessels used to transport contraband drugs.... Forfeiture is not limited to property used in drug crimes, however,...federal and state statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." (631 P.2d 628) (Emphasis Supplied).

unprofitable'.... This is the manifest purpose of Idaho's one year closing provision; not to prevent future expression, but to punish past illegal conduct by depriving the violator of economic gain. That is a permissible state objective, implemented by permissible means."

At page 629 the Idaho Court says:

"Our conclusion is based on the following: the extensive power of the state to impose a forfeiture on neutral and innocent property used in the commission of forbidden acts; the power of the state to impose sanctions of its choice upon those who disseminate unprotected obscenity; the fact that the forfeiture or closure order is not directed at speech or publication, but is instead aimed at the real property apart from the content of expression contained therein; and the fact that the defendants remain free to disseminate any materials except those already determined to be obscene, at

any other location, subject, of course, to further penal actions by the state should the defendants again violate laws regulating obscenity."

This plain and well-spoken rationale can be lifted wholesale and applied to the Indiana RICO law.

III

THE PROCEDURAL SAFEGUARDS OF FREEDMAN, OF HELLER, OF VANCE, OF MARCUS AND OF BOOKS DO NOT APPLY

As has been demonstrated, since there is no "prior restraint" of existing or future publications, then Freedman, Heller, Vance, Marcus and Books do not apply.[15]

There is no effort to censor existing or future expression based on its content.[16] As this honorable Court said "Every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities."[17] and "Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at

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15. Freedman v. Maryland, 380 U.S. 51 (1965); Heller v. New York, 413 U.S. 483 (1973); Vance v. Universal Amusement Co., 445 U.S. 308 (1980); Marcus v. Search Warrant, 367 U.S. 717 (1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1968).

16. Cf., Vance v. Universal Amusement Co., 445 U.S. 308 (1980).

17. Arcara v. Cloud Books, Inc., 106 S.Ct. 3172, 3177.

penalizing and terminating illegal use of premises."[18] If we substitute the word "enterprise" or "corporate charter" for premises in the above quotation we have, in essence, set forth the governmental justification for RICO statutes.

It should be observed that the mere fact that the enterprise has as its purpose a "pornography business" (presumed initially to be protected expression) does not mean that a RICO statute cannot be applied if that business were advanced "by means of a pattern of racketeering activity in which the defendants participated." Cf. (United States v. Thevis, 474 Fed. Supp. 134 at 140 (N.D. Ga. 1979) 665 F.2d 616, at 621, cert. denied, 459 U.S. 825 (1982). In particular "The indictment specified that both corporations were utilized to 'manufacture "peep show" machines, to sell sexually explicit literature and to distribute

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18. Id. at 3178.

'adult oriented films'" United States v. Thevis, 474 F. Supp. 117 at 126 (N.D. Ga. 1979).

Finally the significance of the Arcara case, as it applies to the petitioner's claims of violation of Vance, Marcus, Books and Freedman, can be gleaned from the vigorous dissent in Arcara when Justices Blackmun, Brennan and Marshall complain that

> "Until today, the Court has required States to confine any book banning to materials that are determined through constitutionally approved procedures, to be obscene. See Marcus...Freedman.... Until to-day, States could enjoin the future dissemination of adult fare as a nuisance only by 'adhering to more narrowly drawn procedures than is necessary for the abatement of ordinary nuisance' See Vance...." (106 S.Ct. 3180).

Amicus quotes the dissent (without agreeing with its sentiments or conclusions) but only to further indicate the inapplicability of Vance, Marcus and Freedman to the case at bar.

CONCLUSION

- For all of the above, the decisions of the Indiana Courts should be affirmed.

DATED: May 19, 1988.

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No. 87-470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FORT WAYNE BOOKS, INC.,
Petitioner,

v.

STATE OF INDIANA,
STEPHEN GOLDSMITH, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF FOR AMICUS CURIAE NATIONAL DISTRICT ATTORNEYS' ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF FOR AMICUS CURIAE NATIONAL DISTRICT ATTORNEYS' ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of the National District Attorneys' Association.*

The National District Attorneys' Association is the national service organization for our country's local prosecutors.

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* The assistance in the preparation of this brief of Donald M. Snemis (Notre Dame '88) and Mark L. Collier (Notre Dame '88) is hereby acknowledged.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." 18 U.S.C. § 1961 *et seq.* Congress found that "the sanctions and remedies available" under the law then current to control sophisticated forms of crime were "unnecessarily limited in scope and impact." 84 Stat. 923 (1970). Since 1970, the Federal government has used RICO in criminal prosecutions against organized crime groups, political corruption schemes, white-collar business offenses, and terrorist groups.[1] The Federal government has also brought civil suits to free unions dominated by criminal groups.[2]

Since 1970, twenty-seven states, including Indiana, have followed Congress' lead by adopting similar, but not identical legislation.[3] The states have employed this legislation in criminal prosecutions against a wide variety of illegal conduct.[4]

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[1] *United States v. Brooklier*, 685 F.2d 1208, 1213 (9th Cir. 1982) ("La Cosa Nostra"), *cert. denied*, 459 U.S. 1206 (1983); *United States v. Mandel*, 591 F.2d 1347, 1353, *aff'd by an equally divided court en banc*, 602 F.2d 653 (4th Cir. 1979) (Governor of Maryland), *cert. denied*, 445 U.S. 961 (1980); *United States v. Tamura*, 694 F.2d 591, 594 (9th Cir. 1982) (kickbacks from Japanese corporation); *United States v. Marubeni America Corp.*, 611 F.2d 763, 764 (9th Cir. 1980) (payoffs by Japanese corporation); *United States v. Bagaric*, 706 F.2d 42, 46 (2nd Cir.) (Croation nationalist), *cert. denied*, 104 S. Ct. 283 (1983).

[2] *See, e.g., United States v. Local 560, International Brotherhood of Teamsters*, 581 F. Supp. 279, 282 (D. N.J. 1984), *aff'd*, 780 F.2d 267 (3rd Dist.), *cert. denied*, 106 S. Ct. 2247 (1986).

[3] Blakey and Cessar, *Equitable Relief under Civil RICO*, 62 Notre Dame L. Rev. 526, 596 (1987) (Federal and state statutes collected and analyzed) (cited as "Equitable Relief").

[4] *See, e.g., Carlson v. State*, 405 So.2d 173, 174 (Fla. 1981) (house of ill fame); *Dorsey v. State*, 402 So.2d 1178, 1180 (Fla. 1981) (drugs); *State v. Whiddon*, 384 So.2d 1269, 1270 (Fla. 1980) (theft, burglary, arson, and scheme to defraud); *Moorehead v. State*, 383 So.2d 629, 630-31 (Fla. 1980) (auto theft).

One of the most important aspects of Federal and state RICO legislation is its forfeiture sanctions.[5] Proceeds and other interests that can be related to racketeering activity may be forfeited to the government. *See Russello v. United States*, 464 U.S. 16, 28 (1983) ("RICO . . . was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.") Although not clearly articulated, petitioners essentially contend that Indiana's RICO forfeiture provisions may not be used consistent with the First and Fourteenth Amendments in two areas: (1) as a sanction for "obscenity" violations, or (2) where any offender invests his ill-gotten gains in expressive materials or a business dealing in expressive materials. The National District Attorneys' Association finds these contentions simply wrong. Accordingly, it urges this Court to reject the notion that those who distribute "obscenity"—found to do so in a manner fully consistent with constitutional safeguards—are somehow above the law. Similarly, it urges this Court not to create an expressive materials or business 'safe-haven" for those who profit from violations of the law.

STATEMENT

For the statement of the facts and course of legal proceedings below, the Court is respectfully directed to the brief of the Respondent Stephen Goldsmith.

Restated, one issue is raised:

Do the forfeiture provisions of Indiana RICO work a prior restraint in violation of the First and Fourteenth Amendments?

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[5] 18 U.S.C. § 1963(a) (1982). *See generally*, Blakey, "Asset Forfeiture Under the Federal Criminal Law" in H. Alexander and G. Caiden, The Politics and Economics of Organized Crime 127 (1985).

The National District Attorneys' Association urges this Court to answer this question in the negative.

This brief will address the factual background upon which this critical issue must be examined and resolved.

SUMMARY OF ARGUMENT

Prior to this Court's 1957 decision in *Roth*, prosecutions for "obscenity" of genuinely literary works were common. Since *Roth*, the character of "obscenity" prosecutions and of the material distributed has changed dramatically. Today, "obscenity" prosecutions involve only "hard-core" pornographic material. Such "obscenity" is characterized by little more than graphic sex acts, including but not limited to, intercourse, cunnilingus, fellatio and various forms of sado-masochism.

The abuse of children and the rape and degradation of women fill the pages of this "hard core" material. The definition of "obscenity" under *Roth*—and now *Miller* and *Pope*—limit the discretion of prosecutors, courts and juries in determining "obscenity." The test for "obscenity" now applied under the First and Fourteenth Amendments prevents the sort of abuse that was common under the reign of *Hicklin*. Currently, materials found "obscene" are appropriately and easily characterized as totally lacking in literary, artistic, political, scientific, or other value.

The sex industry is not a matter confined to "consenting adults." Typically, pornography performers are young people, who are poor and in desperate need of quick cash. Lured to the scene by the promise of money, they are forced into performing sex acts that they neither expected nor agreed to. In addition, performers are often supplied with drugs and are coerced into prostitution. Even if they are lucky enough to escape the industry, participation in such pornography haunts these people for the rest of their lives.

Organized crime figures control the sex industry. Through pornography, they make huge profits, launder illegally-gotten monies, and skim profits to defraud the government. Organized crime figures keep a tight rein on the sex industry through violence, which often includes murder. Profits from pornography then fund other organized crime activities, including gambling, the sale of drugs, prostitution, and public corruption.

ARGUMENT

I. THE *HICKLIN* TEST FOR OBSCENITY HAS BEEN REPLACED BY CAREFULLY DRAWN, WORKABLE, STANDARDS UNDER *ROTH-MILLER-POPE*

The protection of pornographic materials as an expression of free speech by this Court is a relatively recent phenomenon. Until 1957, the standards enunciated by Chief Justice Cockburn in *Regina v. Hicklin*, (1868) L.R. 3 Q.B. 360, dominated the law of "obscenity." Under *Hicklin*, the test for "obscenity" was: "[W]hether the tendency of the matter charged . . . [was] to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands . . . [it] may fall." *Id.*

The reign of the *Hicklin* test can only be described as a tyranny of the censorious. The list of genuinely literary works suppressed is long—and hardly justifiable. The works prosecuted include Erskine Caldwell's *God's Little Acre*, James Joyce's *Ulysses*, Radclyffe Halls *The Well of Loneliness*, and Theodore Dreiser's *An American Tragedy*.[6] The oppression became so great that intel-

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[6] *See, e.g., Attorney General v. Book Named "God's Little Acre"*, 326 Mass. 281, 93 N.E.2d 819 (1950) (prosecution of Erskine Caldwell's *God's Little Acre*); *United States v. One Book Called Ulysses*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2nd Cir. 1934) (The book *Ulysses* by James Joyce was subject to an

lectuals, artists, teachers, civil libertarians, and others overreacted. Instead of seeking to rationalize a ban on the degradation of sex, they sought, without qualification, to overturn the ancient power to act against obscenity. Courts, too, began to question the *Hicklin* test. *See, e.g., United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913) (Hand, J.). The criticism of the *Hicklin* test soon found its way to this Court in *Butler v. Michigan*, 352 U.S. 380 (1957). The prosecution involved the prearranged sale of Griffin's *The Devil Rides Outside* to an inspector of Detroit's police censor bureau. The assistant district attorney applied a common-sense variation of the *Hicklin* test in deciding that the book was illegal. He felt that if he would not want his thirteen-year-old daughter to read it, then it would be illegal. *Id.* at 383. The effect was to reduce the entire adult population of Michigan to reading only what was fit for children. *Id.*

On June 24, 1957, this Court handed down its historic *Roth-Alberts* decisions. 354 U.S. 476. For the first time, this Court squarely defined "obscenity" and excluded it from the scope of the protections of the First and Fourteenth Amendments. "Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Id.* at 484. The Court rejected the *Hicklin* test for "obscenity," and it adopted its own test: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.* at 489.

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obscenity prosecution but adjudged not to be obscene); *People v. Friede*, 133 Misc. 611, 233 N.Y.S. 565 (1929) (*The Well of Loneliness* by Radclyffe Hall was found to be obscene despite the fact the prosecution admitted that the book was a "well written, carefully constructed piece of fiction with no unclean words" and the book's literary value was attested to by critics and artists); *Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930) (*An American Tragedy* by Theodore Dreiser found to be obscene by the Massachusetts Supreme Court).

In 1973, the Court re-evaluated the constitutional definition of "obscenity" in *Miller v. California*, 413 U.S. 15. In *Miller*, the Court reformulated the test:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest . . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole lacks serious literary, artistic, political or scientific value. *Id.* at 24. (citations omitted)

The Court also squarely rejected the notion that the First or Fourteenth Amendments embodied a "consenting adults" test in *Miller*'s companion decision of *Paris Adult Theatre I v. Slaton*, 413 U.S. 48, 57 (1973).[7]

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[7] In *Paris*, this Court took notice of the argument against "obscenity" regulation based on the finding of the President's Commission on Obscenity and Pornography (Report at 27) that empirical research had not established a causal relation between exposure to "obscenity" and deviate sexual behavior or crimes of violence. 413 U.S. at 60-65. The Attorney General's Commission on Pornography found the 1970 conclusion to be "starkly obsolete." Final Report at 226 (1986) (cited as "1986 Pornography Comm. Report") The 1986 Commission reviewed the social and behavioral science research available subsequent to 1970, and it presented a much more nuanced perspective. *Id.* at 1034-35 (degree of harm is a function of the degree of the presence of violence, degradation, submission, domination and humiliation).

Prior to the publication of the 1986 Commission's final report, Gray & Company, a Washington, D.C. public relations firm, put together for media clients a national campaign to discredit the work of the Commission. Its themes found fault with all aspects of the Commission's efforts. Final Report of the Attorney General's Commission on Pornography, xlvi-xlviii (Rutledge Hill Press ed. 1986) (Introduction by M. McManus). Even a superficial awareness of the general treatment in the media of the Commission's work warrants the conclusion that the campaign's goals were largely realized. In fact, the work of the Commission warrants careful

The Court's most recent decision interpreting the *Roth-Miller* test is *Pope v. Illinois*, 107 S. Ct. 1918 (1987). In *Pope*, the Court qualified *Miller*: "The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole." *Id.* at 1921. As such, the Court clarified that the first and second prongs of the *Roth-Miller* test are issues of fact to be determined by contemporary community standards, while the third prong of the *Roth-Miller* is an objective test relying on the reasonable person standard.

"Obscenity" prosecutions in the United States have changed dramatically since this Court handed down its landmark decisions in *Roth* and *Miller*. Indeed, since the *Miller* decision was announced in 1973, Federal and state obscenity prosecutions are almost entirely limited to "hard-core" pornography.[8] These prosecutions involve material graphically portraying explicit homosexual and heterosexual intercourse, oral and anal intercourse, sodomy, fellatio, cunnilingus, and masturbation.[9] Many of these cases also involved instances of sado-masochism, bondage, group sex, seminal ejaculation and instances of sexual conduct between members of the same sex.[10] Under

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study and a balanced evaluation. For example, a panel of researchers gathered together by the Surgeon General after the report of the 1986 Commission essentially agreed with the new social science conclusions, particularly as they correlated the presence of violence in "obscenity" and sexual aggression. *Id.* at xviii. The resolution of these sorts of factual conflicts, of course, is a matter for the legislature. 413 U.S. at 60-65.

[8] 1986 Pornography Comm. Report at 1291.

[9] *Id.* at 1291-1295, n. 1518 (citing a lengthy list of cases involving prosecutions for "hard-core" pornography).

[10] *Id.* The change in the character of "obscenity" from "soft-core" to "hard-core" pornography with an increased emphasis on

the *Roth-Miller* standard, material involving nudity without explicit sexual activity or language is not judged obscene.[11]

The movie "Deep Throat" is a typical example of a "hardcore" movie consistently held to be obscene.[12] In "Deep Throat," scenes of explicit sex run from the beginning to end of the film and included cunnilingus, fellatio, and sexual intercourse, during which both heterosexual and homosexual activity occurs with multiple partners.[13] The heroine is played by Linda Lovelace (now Marchiano). After the opening scene, Lovelace walks into a home where a male is engaged in performing cunnilingus on another woman named "Ellen." After several scene changes, Lovelace is shown nude on her hands and knees and a male is engaged in anal intercourse with her. Her pubic area is shaved and close camera shots are shown of the genitals. The male ejaculates on her buttocks. Ellen is shown performing fellatio on one male and engaging in sexual intercourse with another simultaneously. The scene continues with the actors engaging in various other sex acts. Lovelace is portrayed as having intercourse fourteen or more times during the scene.

Lovelace is then shown visiting a psychiatrist to learn why she has never had an orgasm. After an examination,

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violence is the result of its inevitable effect. *See supra* note 7. "Obscenity" desensitizes those who use it and the community within which they live to the conduct portrayed. Each new release must, therefore, "go further" if it is to have an effect. As such, the risk run is that as it grows more bizarre, it will ultimately influence aggressive behavior itself.

[11] *Id.* at 1295,n. 1528.

[12] *See, e.g., People v. Thomas*, 37 Ill. App.3d 320, 346 N.E.2d 190 (1976); *Magwm v. States Attorney for Baltimore City*, 275 Md. 450, 341 A.2d 786 (1975); *Coleman v. Wilson*, 123 N.J.Super. 310, 301 A.2d 555 (1973).

[13] 1986 Pornography Comm. Report, at 1716-1726.

the doctor explains that her clitoris is in her throat, and he tests his theory by having her perform fellatio on him. He explains that she needs to learn to "deep throat." Deep throat, he explains, is the act of fellatio with the penis inserted into the throat. The doctor offers Lovelace a job at his office where she can fulfill herself sexually.

Throughout the rest of the film, Lovelace engages in various acts of sex, including having a specimen jar inserted in her vagina and filled with soda. A tube is inserted into the jar and both Lovelace and another male drink from the tube. She also engages in group sex, performing acts of cunnilingus, fellatio and intercourse. Lovelace is shown shaving her pubic hair in front of a patient pretending to be a burglar. The man tells Lovelace he is going to rape her, and she consents to her own violation. The man then becomes upset that she is not frightened. Lovelace performs acts of fellatio and intercourse with the rapist. The movie portrays Lovelace as being so satisfied with the would-be rapist that she falls in love with him and wants to marry him.

"Deep Throat" is but one movie among thousands of movies, magazines, and films depicting explicit sex. The titles of films reflect their content: "A Coming of Angels" to "Youthful Lust," "Bizarre Bondage," "Color Climax," "Dirty Girls," etc.[14] Similar "hard-core" obscenity may be found in hundreds of magazines, the titles of which range from "A Cock Between Friends" to "69 Lesbians Munching." [15]

Today, sexually explicit material also includes graphic sex by children, how-to-do-it rape manuals, and other magazines that dehumanize women. Indeed, a well-known pornographic magazine several years ago contained a step-by-step photographic manual of rape techniques, including how to tie the woman up.[16] Instances of rape and child molesting where "obscenity" play an integral part abound. For example, "On one occasion the Michigan State Police apprehended a rapist in the very act: he had the woman tied down and had the magazine propped up nearby, opened to the how-to-do-it pictures." [17]

[14] *Id.* at 1505-1612.

[15] *Id.* at 1505-1545.

This Court's decision in *Jenkins v. Georgia*, 418 U.S. 153 (1974) demonstrates, moreover, that "obscenity" prosecutions must be limited to "hard-core" pornography. In *Jenkins*, the Court reversed an "obscenity" conviction involving the movie "Carnal Knowledge." The Court noted that the movie was considered one of the top ten movies of 1971, received a number of favorable reviews, and an actress was nominated for an Academy Award for her role in the movie. *Id.* at 158 n.5. The Court held as a matter of law that the movie was not obscene under the *Miller* standard.

Prosecutions for "obscenity" under today's standards are marked by significant differences from those brought under the *Hicklin* test. No longer is there a serious danger that literary works with social value or importance will be adjudicated obscene. The overwhelming majority of "obscenity" prosecutions, in short, involve "hard-core" pornography with no literary, artistic, political or scientific value, and they reflect fact-patterns where serious disputes about the character of the material is not present. Moreover, under *Jenkins*, juries no longer have discretion to find that legitimate works with literary value are obscene. Today, a jury's determination that material is obscene may be reviewed by the trial court and appellate courts and overturned if inappropriate.

The blunt truth is that *Roth-Miller* has worked and is working well. The line between what is "obscene" and what is not is clear enough in practice. Accordingly, the

[16] W. Stanmeyer, The Seduction of Society 40 (1984) (cited as "Stanmeyer").

[17] *Id.* at 24.

sphere of "obscenity" is now so well-marked off that no intellectual, artist, teacher, or librarian ought have any legitimate fear that his or her work will be the subject of an "obscenity" prosecution.

II. THE SEX INDUSTRY IS CHARACTERIZED TODAY BY YOUTH, POVERTY, DRUG USE, PROSTITUTION AND PERSONAL DEGRADATION

A popular myth exists in this country that performers in so called adult films and magazines are well-paid men and women who freely choose to be involved in the pornography industry. That male fantasy is tragically false. More often than not, actors and actresses in pornographic films and models in pornographic magazines are young people who are involved in pornography simply because they are poor. *See Vernon v. Bethell*, 2 Eden 110, 113 (Ch 1761) (Lord Northington) ("necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit any terms that the crafty may impose of them"). In addition, pornographers regularly use mental and physical force to coerce actors and models to perform their sexual roles.

Youth is a prerequisite for a porn "star." Experts say that the age of porn performers is generally between the late teens and early twenties.[18] Enforcement of age limitations is typically lacking. For instance, in a California case a pornographer was prosecuted for using a fourteen-year-old girl for a pornographic magazine.[19] In another, an Oklahoma couple forced their daughters to engage in family sex while photographs were taken for pornography; the four girls were ages ten to seventeen.[20]

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[18] Sampson, "Commercial Traffic in Sexually Oriented Materials in the United States" in 3 Technical Report of the Commission on Obscenity and Pornography 186 (1971).

[19] *People v. Fixler*, 128 Cal. Rptr. 363, 56 Cal. App. 3d 321 (2d Dist. 1976).

[20] Letter from Oklahomans Against Pornography to the Attorney General's Commission on Pornography, cited in 1986 Pornography Comm. Report, at 780.

These young people get involved in the sex industry because they are poor and need money quickly. For instance, actor Sylvester Stallone, who once performed in a pornographic movie, said he only did it because he was literally starving.[21] A former porn model has indicated that most women come into the porn business under financial stress.[22] She gave two examples. One woman had a child in the hospital; the other was an illegal alien who could not otherwise find a job. The pornography industry is lucrative, but porn performers rarely share in the huge profits made by the pornographer. For example, the movie "Deep Throat" made millions at the box office,[23] but the "star" of the film, Linda Lovelace (now Marchiano), was hardly paid anything for her role.[24]

Porn producers prey on those who use or are dependent on drugs. Often, the only pay a porn performer gets is

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[21] Stallone said, "It was either do the movie or rob someone." Playgirl, Oct. 1985, at 30.

[22] The former pornography performer stated:

> A lot of women are hurt or crazy-women under stress. Yes, most women come in under a lot of stress. They're usually desperate when they first come in—maybe they need money for some emergency, like I did, or they've gone as long as they can doing odds and ends or working at (menial) jobs, and they finally just have to pay their bills. I met a woman whose kid was in the hospital, and I met lots of women who were financially strapped. There were also many illegal aliens there who couldn't work regular jobs even if they had the skill because they didn't have their green cards. . . . [T]hey certainly know how to get you to do what they want. Some women are so bad off that they just go immediately into hard-core films.

Lederer, "Then and Now: An Interview with a Former Pornography Model," in Take Back the Night: Women on Pornography 58-59 (1980).

[23] "The Pornography Industry", The Boston Globe (1983), at 31 (cited as "Boston Globe Report").

[24] 1986 Pornography Comm. Report, at 467 (testimony of Linda Marchiano).

drugs.[25] Pornographers use and exploit women in yet another way. It is a natural—and often coerced—step from pornography to prostitution.[26]

Pornography can destroy a person's future. Involvement in pornography lessens a young actor's or actress' employment prospects in legitimate films and roles. Many companies will not hire a person if he or she has participated in pornography.[27] Participation in pornography haunts a person for the rest of his or her life. The result of one mistake made by a person, when they were young, gives rise to a constant fear that friends, parents, spouses or children will later discover that mistake—a porn film or photograph.

Young women are often forced to participate in pornography. Runaways are picked up by pimps and exploited. Sometimes, when women agree to appear nude, they are coerced or forced to participate in sex acts that they neither expected nor agreed to.[28] Women have even

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[25] Stanmeyer, at 40; National Advisory Committee on Criminal Justice Standards and Goals, Organized Crime: Report of the Task Force on Organized Crime 12 (1976) (cited as "Organized Crime Task Force Report").

[26] Stanmeyer, at 40; Organized Crime Task Force Report, at 12.

[27] C. Hix, Male Model 166 (1979). Jimmy Grimme, owner of the Grimme Modeling Agency, added:

> I won't take a model if I find out he's done any porno films or if he's ever modeled in a gay magazine. I won't touch him. . . . Let's face it, if you're spending a million a year and you're picking a theme boy, you want to make sure that that boy has not appeared in some magazine completely unclothed, lying there like: Take me. It doesn't keep up the image.

Id. at 168.

[28] A man who participated in over one hundred porn films over two and a half years told the 1986 Pornography Commission:

> I have seen it totally destroy too many lives, but mostly the girls (sic). It's a lot harder on young ladies. I have seen a lot of producers and directors and photographers, just to get

reported being imprisoned, beaten, and abused sexually when they try to escape pornography. Linda Marchiano, for example, reported to the 1986 Pornography Commission that she was imprisoned and beaten when she tried to get out of her "Deep Throat" role. She stated, "Used and abused by Mr. Traynor (her husband at the time and the director of "Deep Throat") (my) captor, (I) was forced through physical, mental, and sexual abuse and often at gunpoint and threats of (my) life to be involved with pornography."[29] When making porn material depicting sado-masochistic abuse, women and girls are in fact tortured and suffer permanent physical damage.[30]

Andrea Dworkin, the author of *Men Possessing Women*, summed up the way women are treated in producing pornography in the United States in the 1980s:

> [I]n this country where I live, every year millions of pictures are being made of women with our legs spread. • • • Millions and millions of pictures are made of us in postures of submission and sexual access so that our vaginas are exposed for penetration, our anuses are exposed for penetration, our throats are used as if they are genitals for penetration. • • •
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> [W]omen are penetrated by animals and objects for public entertainment, women are urinated on and defecated on, women and girls are used interchange-

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> out a product that they have in mind, either badger or almost force the girls into doing things that they would really rather not do. I, myself, have been on a couple of sets where the young ladies have been forced to do even anal sex scenes with a guy which is rather large and I have seen them crying in pain and just (sic) totally destroys their personality when they are forced to do things like that.

1986 Pornography Comm. Report, at 773 (Los Angeles Hearing).

[29] 1986 Pornography Comm. Report at 787 (testimony of Linda Marchiano).

[30] *Id.*, at 787-788 (Los Angeles Hearing).

ably so that grown women are made up to look like five- or six-year-old children surrounded by toys, presented in mainstream pornographic publications for anal penetration. • • •

[T]here is a trade in racism as a form of sexual pleasure, so that the plantation is presented as a form of sexual gratification for the black woman slave who asks please to be abused, please to be raped, please to be hurt. • • •

Pornography is used in rape—to plan it, to execute it, to choreograph it, to engender the excitement to commit the act. Pornography is used in gang rape against women. We see an increase since the release of "Deep Throat" in throat rape—where women show up in emergency rooms because men believe they can penetrate, deep-thrust, to the bottom of a woman's throat. • • •

We have seen in the last eight years, an increase in the use of cameras in rapes. And those rapes are filmed and then they are put on the marketplace and they are protected speech—they are real rapes. • • •

We see pornography having introduced a profit motive into rape. We see that filmed rapes are protected speech. We see the centrality of pornography in serial murders. There *are* snuff films. • • •

[W]e see women also suffering the injury of objectification—that is to say we are dehumanized. We are treated as if we are subhuman, and that is a precondition for violence against us. • • •

The civil impact of pornography on women is staggering. • • •

I . . . ask . . . you to help the exploited, not the exploiters. • • • [31]

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[31] *Id.*, at 769-772 (testimony of Andrea Dworkin) (emphasis in original). Dworkin's points may be made more concrete from a law enforcement perspective. A manifest effect of the "obscenity" distributed today is the desensitizing of those who come into contact with it and others in the community. *See supra* note 7. Whatever

III. ORGANIZED CRIME GROUPS CONTROL THE SEX INDUSTRY THROUGH EXTORTION AND VIOLENCE, INCLUDING MURDER, WHILE REAPING HUGE PROFITS TO FINANCE OTHER ILLEGAL ACTIVITIES, INCLUDING GAMBLING, THE SALE OF NARCOTICS, AND PROSTITUTION

Among law enforcement veterans and other crime experts, little doubt exists that organized crime figures control the sex industry. James Fratianno, one of the highest-ranking organized crime figures to ever testify against La Cosa Nostra, was asked about the sex industry by the 1986 Pornography Commission. Fratianno estimated that ninety-five percent of the organized crime families are involved in porn; he also confirmed the huge amount of profit organized crime reaps from pornography.[32]

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the correlation between "obscenity" and aggressive acts, a clearly measured relationship is present of increased callousness. In turn, that callousness will inevitably translate into fewer jury verdicts in charges of sex offenses where defenses of consent are interposed. (How was she harmed, anyway?) A legislature can make spousal abuse or rape illegal, when it involves those who previously knew each other (date rape). It should not be forced to accept fewer guilty verdicts in these sensitive areas because of the effects of "obscenity," regardless whether the "consumer" is consenting or not. What is consumed by a few will, in fact, ultimately effect how the rest of us are treated. Juries that are drawn from a desensitized community will treat these offenses differently. No caring community ought to be forced to accept that result. For a summary of relevant research *see* Pornography Comm. Report (1986).

[32] Fratianno testified:

Interviewer: Could you describe the nature and type of involvement organized crime would have in the pornography industry when you were active in organized crime?

Fratianno: Well, it's very, very big. . . . I'd say, ninety-five percent of the families are involved in one way or another in the pornography. . . . It's too big. They just won't let it go.

[Continued]

A 1978 FBI report concluded: ". . . [O]rganized crime involvement in pornography . . . is indeed significant, and there is an obvious national control directly and indirectly by organized crime figures of that industry in the United States."[33] A former FBI agent told the 1986 Pornography Commission:

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[32] [Continued]

Interviewer: Okay, does organized crime reap a lot of money from their involvement in the pornographic industry?

Fratianno: Absolutely, Absolutely.

1986 Pornography Comm. Report, at 1052-1053 (testimony of James Fratianno). The 1970 Commission indicated that there was "no concrete evidence" of an organized crime connection to the sex industry. Report at 141-43. In fact, FBI experts provided the Commission with evidence that it chose to ignore. 1986 Pornography Comm. Report, at 1042.

[33] Federal Bureau of Investigation, The Extent of Organized Crime Involvement in Pornography (1978) (unpublished) (cited as "1978 FBI Report"). The Report draws its conclusions from a survey of FBI field offices across the country. The Report indicates, "Information obtained during the course of the enclosed survey points out the vast control of the multi-million dollar pornography business in the United States by a few individuals with direct connections with what is commonly known as the organized crime establishment in the United States, specifically, La Cosa Nostra.". *Id.*, at b. The Report continued:

> Few pornographers can operate in the United States independently without some involvement with organized crime. . . . More importantly, the huge profits gathered by organized crime from this area and then redirected to other lucrative forms of crime, such as narcotics and investment in legitimate business enterprises, is certainly cause for national concern even if there is community apathy toward pornography.

Id. at k.

The point may be made more concretely. Michael Thevis, one of the nation's largest and most violent pornographers, once told a meeting of organized crime figures that he owned 90% of the movie viewmatic machines in the country; he was interrupted by Robert DiBernado, who reminded him that he might have "proprietary rights" in the machines, but they were owned by the family."

[Continued]

> In my opinion, based upon twenty-three years of experience in pornography and obscenity investigations and study, it is practically impossible to be in the retail end of the pornography industry (today) without dealing in some fashion with organized crime either the mafia or some other facet of non-mafia never-the-less highly organized crime.[34]

State and local law enforcement officials concur. High-ranking police officials in Chicago and Los Angeles have made similar statements.[35]

Independent state reports corroborate the F.B.I. survey and the testimony of individual police officials. The 1983 Report to the Governor of Ohio concluded: "[T]he nation's growing pornography industry is dominated by East Coast organized crime families."[36] The Report also noted: "[T]his lucrative business is a major source of

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[33] [Continued]

1986 Pornography Comm. Report, at 1062. On DiBernado, *see* text *infra* at nn. 54-58. Thevis was ultimately convicted of Federal RICO; one of the predicate offenses was the murder of the principal witness against him. *See United States v. Thevis*, 665 F.2d 616, 622-24 (5th Cir. 1982), *cert. denied*, 456 U.S. 1008 (1982).

[34] 1986 Pornography Comm. Report, at 1047 (testimony of William P. Kelly).

[35] *See, e.g.*, Thomas Bohling, of the Chicago Police Department's Organized Crime Division, who testified, ". . . [I]t is the belief of state, federal, and local law enforcement that the pornography industry is controlled by organized crime families. If they do not own the business outright, they most certainly extract street tax from independent smut peddlers." 1986 Pornography Comm. Report, at 1048; Chief Daryl F. Gates of the Los Angeles Police Department, who testified, "Organized crime infiltrated the pornography industry in Los Angeles in 1969 due to its lucrative financial benefits. By 1975, organized crime controlled eighty percent of the industry and it is estimated that this figure is between eighty-five to ninety percent today.", *Id.*, at 1048-1049 (Los Angeles Hearing).

[36] The Law Enforcement Consulting Committee, Organized Crime: Report to the Governor of Ohio 69 (1983) (unpublished) (cited as "1983 Ohio Report").

income for organized crime throughout the United States." [37] A 1986 Report on Organized Crime in California by the State's Attorney General concluded, "Organized crime is heavily involved in adult videotape distribution nationwide, and in production primarily in Southern California." [38].

Official reports are corroborated by investigative reporting. For example, the Boston Globe published an extensive series on pornography in 1983. During the investigation, the Globe found that pornography was tied to organized crime. Its report concluded: "[P]ervasive evidence indicates that many of these businesses are controlled or heavily influenced by organized crime, which has been active in the industry for years, especially in the distribution of films, magazines, and so-called marital aids." [39]

The obvious motive for organized crime involvement in pornography is profit. The pornography industry produces between seven and ten billion dollars per year.[40] The profit margin is immense because the product is made cheaply, but sold with a highly inflated price. Magazines that cost about fifty cents to make are sold wholesale for five dollars and retail for ten dollars.[41] A twelve-minute pornographic movie cost about three dollars to make, but

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[37] *Id.* at 70.

[38] California Attorney General, Annual Report to the California Legislature: Organized Crime in California 1986 (1986) (unpublished) (cited as "1986 California Report"). An earlier Pennsylvania Crime Commission investigation determined that most of the adult bookstores in the Pennsylvania area were connected to one of three men who had close ties to organized crime families. Pennsylvania Crime Commission, A Decade of Organized Crime: 1980 Report, 119 (1980) (cited as "1980 Pennsylvania Report").

[39] Boston Globe Report at 1.

[40] 1986 California Report at 7.

[41] Pennsylvania Report at 118.

it retails for fifty dollars.[42] Accordingly, the sex industry has become the third largest source of income for organized crime in the United States today.[43]

Pornography also serves organized crime as a perfect money-laundering front. Since the sex industry has such a large volume of cash-flow, monies from other illegal activities can easily be laundered without detection.[44] The opportunity to skim profits for the pornography business to avoid taxation is yet another motive for organized crime figures to attempt to control pornography.[45] Combine these elements with lax law enforcement, and a perfect vehicle for organized crime is created.[46]

Organized crime involvement in pornography began in the late 1960's, when John Franzee began supplying and operating peep-show machines in pornography stores in New York City.[47] Organized crime was one of the few

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[42] Organized Crime Task Force Report at 227. Profit margins on other items can be as high as 3200 percent. Stanmeyer at 44.

[43] 1978 FBI Report, at b. Stanmeyer notes the connection between pornography and other sources of income for organized crime:

> Organized crime creams off immense profits from pornography. It uses millions of dollars in profits from magazines, movies, and other pornographic "entertainment" to finance narcotics deals and prostitution. Our society will not make much progress in the war against drug abuse, prostitution, and racketeering until we destroy the privileged financial sanctuary that is the pornography money machine.

Stanmeyer, at 39.

[44] 1983 Ohio Report, at 66; 1980 Pennsylvania Report, at 118.

[45] *Id.*

[46] The National Advisory Committee on Criminal Justice Standards and Goals in its 1976 Report concluded: "[Pornography] is a logical field for entry (by organized crime), given the facts of a prohibited product with a large market; susceptibility to good organization and muscle; and lax law enforcement." Organized Crime Task Force Report at 226.

[47] 1980 Pennsylvania Report, at 118; Boston Globe Report, at 30.

groups that was willing aggressively to market porn, as it did not fear the social stigma or legal problems resulting from occasional arrests for peddling obscene material.[48] Organized crime already had a nationwide distribution system, which aided their takeover. The 1980 California Attorney General's report traced how organized crime figures went from control of distribution to control of the industry itself:

> Once traditional organized crime controlled pornography distribution, it then took steps to control actual production of the material as well . . . . Thus, organized crime was able to consolidate and exercise its continuing monopoly in the illegal and legal hard core pornography product market. . . ." [49]

Today, organized crime figures are involved in all aspects of the pornography industry. This includes magazines, books, films, sexual devices, live sex shows, production, wholesale, retail, and distribution.[50] When a new porn shop opens, organized crime will immediately demand payments for "protection." [51] The usual pattern is that mob enforcers will visit a successful porn producer and ask for the distribution rights. If the producer refuses, the organized crime family will make pirated or

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[48] Boston Globe Report, at 7.

[49] California Attorney General's Report on Organized Crime (1980) at 32, *cited in* Boston Globe Report at 32.

[50] Stanmeyer at 43. Stanmeyer explains:

> Subjected to typical strong-arm tactics, the owners soon had to give organized crime 50 percent of their profits. From there, it was but a short step to insisting that all outlets use projection machines supplied by organized crime. By 1969, the Colombo family had obtained about 60 percent of the porno movies in New York.

Id. at 42.

[51] In the late 1970's, FBI agents, for example, started an undercover porn business in Los Angeles. Soon, three organized crime figures confronted the agents and attempted to extort money. 1978 FBI Report at c.

"bootleg" copies of the film and ruin the market for that particular film.[52] In addition, the mob will not hesitate to resort to violence if it feels that it is the most effective way to keep control of the industry.[53]

Most of the major pornography figures may be directly or indirectly linked to organized crime families. Reuben Sturman, for example, is widely recognized as the "king" of pornography in the United States—and possibly the world.[54] Sturman operates out of Cleveland, but he has close contacts with members of the DeCavalcante organized crime family of New Jersey.[55] Sturman's contact in the DeCavalcante family was, until recently, Robert DiBernardo. DiBernardo helped Sturman monopolize the

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[52] A classic example of the way organized crime figures move in on porn production is the story of the film "Behind the Green Door." In 1984, an independent film company, the Mitchell Brothers film Group Inc. of San Francisco, produced "Behind the Green Door", which starred Marilyn Chambers. The Mitchells were visited by James Bochis and Robert DeSalvo, two New York Mafia family associates, who said they wanted to distribute the film. The Mitchells refused; Bochis and DeSalvo responded by threatening that they would distribute bootleg copies of the film. In fact, hundreds of pirated versions showed up all over the country and the producers lost several key markets, including Las Vegas, Miami, and Dallas. The film got a bad reputation because of the poor quality of the bootleg copies. Finally, the Mitchells were forced to assign distribution rights to Michael Zaffarano of the Galante family for one of their next films. Boston Globe Report at 32, Organized Crime Task Force, at 227. Robert DeSalvo, who also provided evidence on behalf of the United States in a trial against other mob figures involving the distribution of the movie "Deep Throat," has been missing since January of 1976; he is presumed murdered. 1986 Pornography Comm. Report, at 1055-56.

[53] The violence includes bombing and shattering knees. 1986 Pornography Comm. Report, at 1057 (New York Hearing).

[54] 1983 Ohio Report, at 70; Boston Globe Report, at 32.

[55] An agreement existed in 1980 between the Gambino and DeCavalcante organized crime families to split up the pornography industry. Boston Globe Report, at 18.

eight millimeter porn film industry through strong-arm shakedowns of other dealers, distributors and suppliers throughout the United States, especially the West Coast.[56] Eventually DiBernardo became Sturman's enforcer; he disappeared in 1986, and, he is believed to have been murdered by rivals in the Gambino family.[57] James Fratianno confirmed Sturman's connections to the Gambino family, indicating Sturman paid protection money to Ettore Zappi, a captain in the Gambino family.[58]

Until his death in 1979, John Krasner was another major porn producer; he was based in Pennsylvania. His short career also well-illustrates the character of those who run the sex industry and the events that have come to be known as the "Pennsylvania Porn War." Krasner's empire encompassed at least Pennsylvania, New York, New Jersey, and Virginia. In addition, Krasner had porn interests in Florida and California[59] and connections with California pornographers Norman Arno and Theodore Gaswirth.[60] Arno and Gaswirth were connected with Robert DiBernardo of the DeCavalcante family and Michael Zaffarano of the Galente family of New York.[61]

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[56] 1978 FBI Report, at c.

[57] 1986 California Report, at 8.

[58] Boston Globe Report, at 32. Fratianno never said how much money was paid in total, but he did say that Sturman paid Zappi $200,000 once when Fratianno and others sent a representative to Cleveland to "rough up" Sturman. *Id.*

[59] 1980 Pennsylvania Report, at 119. Krasner began his porn empire with an $80,000 loan from an organized crime loanshark. *Id.*

[60] *Id.* Arno has also been identified with the Bonanno organized crime family. In 1986 California Report, at 11.

[61] 1980 Pennsylvania Report, at 119. Zaffarano functioned as the national coordinator for the various organized crime families in the 1970s. Boston Globe Report, at 30. Zaffarano was the highest-level organized crime figure originally indicted under the FBI's

Allen Charles Morrow was a Krasner employee, who set out on his own in the porn business. The break off was not friendly. Krasner employee Frank N. Beaver was stopped near Harrisburg, Pennsylvania with eighty-five pounds of explosives in his car. He was on his way to blow up a Collegeville, Pennsylvania pornography store owned by Morrow. Unfortunately for him, Beaver had just solicited the assistance of an undercover agent of the U.S. Treasury's Bureau of Alcohol, Tobacco, and Firearms.[62] Krasner was later charged with soliciting James Flood, another Pennsylvania man, to kill Morrow. Flood went to Morrow with the plan and offered to kill Krasner in a double-cross. Morrow went to the police with the story and Krasner was found guilty of solicitation of murder.[63]

While his case was on appeal, Krasner went to Fort Lauderdale, Florida. On February 6, 1979, Krasner was shot five times and killed. On May 29, 1979, Morrow was shot, but survived.[64] The "Pennsylvania Porn War" then ended.

Finally, a perfect example of success in pornography for organized crime is the film "Deep Throat," the most successful piece of pornography ever produced. Louis, Joseph, and Anthony Peraino were distributors of hard-core porn for the Colombo organized crime family.[65] The Colombo family put up $25,000 for "Deep Throat," and the Perainos were put in charge of its production.[66]

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undercover investigation, code named "MiPorn." He died of a heart attack less than one hour after Federal agents set out to arrest him. 1980 Pennsylvania Report, at 118.

[62] *Id.* at 120.

[63] *Id.*

[64] *Id.*

[65] Boston Globe Report, at 31.

[66] *Id.*

"Deep Throat" made up to $100 million at the box office alone.[67] That money was then used to buy yachts, limousines, and airplanes for the Colombo family and to further its myriad illegal activities, including drug smuggling in the Caribbean.[68] Not all of those who were associated with "Deep Throat's" production, however, profited; Joseph Periano's son was subsequently murdered in a turf war over the porn industry.[69]

CONCLUSION

This Court should find that the forfeiture provisions of the Indiana Rico statute may be constitutionally applied in civil or criminal cases when the predicate crime is "obscenity."

Respectfully submitted,

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[67] *Id.*

[68] 1986 Pornography Comm. Report, at 1052. Money from "Deep Throat" was used to develop Norman's Cay, one of the major drug smuggling bases north of the Panama Canal. *Id.* at 1060.

[69] *Id.* at 1056.

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Nos. 87-470 and 87-614

In The

Supreme Court of the United States

October Term, 1987

No. 87-470

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, et al.,
Respondents.

No. 87-614

RONALD W. SAPPENFIELD, FANTASY ONE, INC., and FANTASY TWO, INC.,
Petitioners,

vs.

STATE OF INDIANA,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT AND COURT OF APPEALS OF THE STATE OF INDIANA

BRIEF AMICUS CURIAE OF TOM COLLINS, AS COUNTY ATTORNEY FOR THE COUNTY OF MARICOPA, STATE OF ARIZONA, IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Your amicus curiae is the Honorable Tom Collins, duly elected County Attorney for Maricopa County, Arizona. He is the chief law enforcement officer of the county, with criminal prosecution authority over felonies and misdemeanors. He also represents the county in all civil matters.

Arizona's organized crime and fraud statutes (RICO), A.R.S. § 13-2301, et. seq., as applied to obscenity offenses, was partially invalidated by the Arizona Court of Appeals in State v. Feld, 745 P.2d 146 (Ariz.App. 1987) cert. denied, ____ U.S. ____ 1988. Feld is presently pending in the Arizona Superior Court for further proceedings

under remaining obscenity and RICO indictments. The trial court, whose invalidation the Arizona Court of Appeals upheld, retains jurisdiction.

The Indiana RICO statute before this Court is substantially similar to the Arizona statute partially invalidated in Feld. If this Court holds that the Indiana RICO statute is constitutional (as it should), the Arizona courts retain jurisdiction over Feld to reconsider its federal constitutional ruling invalidating the Arizona statute.

SUMMARY OF ARGUMENT

I. The Use Of RICO With Obscenity Offenses Is Supported By The Purpose of RICO And Passes Muster Under The United States Constitution.

II. The Purpose Of RICO Is Not To Restrain Protected Speech. Any Impact On Speech Is Incidental To Lawful Non-speech Related Enforcement.

III. First Amendment Interests Are Adequately Protected By Forcing The Prosecution To Prove The Predicate Offense Of Obscenity Before Defendants Can Be Convicted of Racketeering.

LAW AND ARGUMENT

I. THE USE OF RICO WITH OBSCENITY OFFENSES IS SUPPORTED BY THE PURPOSE OF RICO AND PASSES MUSTER UNDER THE U.S. CONSTITUTION.

Congress and various state legislatures have added obscenity to their RICO statutes in order to fulfill the goals of RICO -- fighting organized crime -- not as a device to suppress protected material or to chill protected speech.[1]

Several reports, including the California Attorney General's 1987

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[1] CONG.REC. § 433-458 (daily edition, Jan. 30, 1984) (statement of Sen. Helms). Senator Helms, in introducing the amendment that added "dealing in obscene matter" to the federal RICO statute, put into the record material showing the profits organized crime gains from the sale of illegal obscenity, and reiterated that RICO was intended to provide "a means of dealing with organized crime." Id. at § 433.

Report on Organized Crime in California and the Final Report of the Attorney General's Commission on Pornography, have concluded that organized crime is behind most of the production and distribution of illegal, obscene pornography. The California report estimated that nationwide revenues from pornography range from $7 billion to $10 billion annually, "and organized crime is believed to be connected to most of this money." Attorney General's Report on Organized Crime in California at 7 (1987). It also concluded that "pornography was a lucrative part of organized crime operations" in California in 1986. Id. The Attorney General's Commission on Pornography endorsed the FBI's 1978 findings that ". . .

organized crime involvement in pornography . . . is indeed significant, and there is an obvious national control directly, and indirectly, by organized crime figures of that industry in the United States. Few pornographers can operate in the United States independently without some involvement with organized crime. The huge profits gathered by organized crime in this area and redirected to other lucrative forms of crime, such as narcotics and investment in legitimate business enterprises, are certainly cause for national concern . . ." Final Report of the Attorney General's Commission on Pornography, at 1071. These conclusions were important factors in the decisions of Congress and the various states to amend their

RICO statutes by including obscenity as a predicate offense.

Indeed, this Court has recognized that the purpose of the federal RICO statute is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." Russello v. United States, 464 U.S. 16, 26 (1983). Its provisions are to be construed liberally to bring about its remedial purposes. United States v. Turkette, 452 U.S. 576 (1981). One of the most important of those remedies is the forfeiture of assets. Russello, supra. To effectuate this same purpose, the Indiana RICO statute should be liberally construed to accomplish its remedial intent.

A. <u>The purpose of RICO is not to restrain protected speech. Any impact on speech is incidental to lawful non-speech related enforcement activities.</u>

The use of RICO statutes in obscenity proceedings does not unconstitutionally restrain speech. Defendants may continue to sell or exhibit non-obscene material as long as they do not use the proceeds, instrumentalities, or property of past criminal activities.

The reasoning of Petitioners in the instant case, put into practice, would lead to absurd results. Under those arguments if a premises is used to sell narcotics or forged documents, but also sells magazines, that property is immune from forfeiture and the "enterprise" cannot be dissolved. Racketeers could simply enter the

magazine business to avoid RICO forfeitures.

The record herein makes clear that Indiana's purpose is not to use RICO to restrain future expressive activities, but seeks the dissolution of an "enterprise" or forfeiture of property because of past criminal conduct. The penalties are imposed for reasons unrelated to the suppression of speech.

Obviously, some inconvenience to speech is caused by all criminal laws, including RICO. In every case where a person is imprisoned for distributing obscenity, the imprisonment limits that criminal's ability to distribute communicative material, as two justices of this Court noted in Vance v. Universal Amusement Co., 445 U.S. 308, at 320, 324 (1980) (Justices White and

Rehnquist). See also Arcara v. Cloud Books, ___ U.S. ___, 106 S.Ct. 3172, 92 L.Ed.2d 568, 577 (1986) (". . . every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities.") But under Petitioners' reasoning, a person could engage in the RICO predicate offenses of prostitution, restraint of trade, or trafficking in stolen property at a commercial establishment which also sells paperback novels, and this would immunize the establishment from forfeiture. This would obviously provide a loophole for organized crime to avoid the intended impact of RICO and defeats the purpose of the statute.

This Court has repeatedly recognized that it does not abridge

freedom of speech to make a course of conduct -- in this case racketeering -- illegal, even though the conduct is in some respect carried out by means of expression. Cox v. Louisiana, 379 U.S. 559, at 563 (1966) (". . . it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." Quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490 at 502, 93 L.Ed. 834 at 843-44 (1949)).

Arcara v. Cloud Books, supra, is squarely on all fours. There, this Court upheld the closure of a pornography bookstore that was also

used as a place of prostitution. Like the Indiana RICO statute, the nuisance abatement legislation in Arcara was concerned with unlawful conduct and only incidentally related to expression. This decision is directly on point: "Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal use of premises." 92 L.Ed.2d at 578. So long as there is no "speech suppressive motivation or policy" shown in the enforcement of the RICO statute it is constitutional. 92 L.Ed.2d at 578 N.4 (emphasis added). The Indiana RICO statute is applicable to all enterprises or property used in racketeering activity -- not just obscenity.

The Indiana Supreme Court recognized this stating that "the purpose of the forfeiture provision is totally unrelated to the nature of the assets in question." 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 565 (Ind. 1987). The remedies provided in RICO "are a legitimate tool in the attack on racketeering activity." Id. To find otherwise would allow persons to thwart the law by effectively shielding their enterprise "behind a pseudo-constitutional barrier." Id. Because RICO is an attempt to compel forfeiture of property used in racketeering activity and "not to restrain the future distribution of expressive materials" the Court held that RICO, as it pertains to the "predicate offense of obscenity" does

"not violate" the First Amendment. Id.

Where the purpose of a statute is unrelated to the suppression of speech, as with RICO, there are many circumstances which permit closure of businesses engaged in expressive activity. Closure of nonconforming adult bookstores and theatres is permitted under amortization provisions of "adult use" zoning ordinances. Hart Bookstores v. Edmisten, 612 F.2d 821, 830 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980); Northend Cinema Inc. v. Seattle, 585 P.2d 1153, 1160 (1978), cert. denied sub. nom. Apple Theatre v. Seattle, 441 U.S. 946 (1979). The denial of a license to open or operate an adult bookstore or theatre has been

upheld where denial was based on a prior prostitution, child pornography, indecent exposure, or obscenity conviction. Dumas v. City of Dallas, 648 F.Supp. 1061, 1073 (N.D.Tex. 1986), upheld at ____ F.2d ____ (5th Cir. 1988) (relying on Arcara, supra); also see 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973), cert. denied, 422 U.S. 1044 (1975); Barrago v. City of Louisville, 456 F.Supp. 30, 32 (W.D.Ky. 1978); Airport Bookstore, Inc. v. Jackson, 248 S.E.2d 623 (Ga. 1978), cert. denied sub. nom. Gateway Books v. Jackson, 441 U.S. 952 (1979); West Gallery Corporation v. Salt Lake City Board of Commissioners, 586 P.2d 429 (Utah 1978). In Commonwealth v. Croatan Books, 323 S.E.2d 86 (Va. 1984), the

Virginia Supreme Court upheld a bookstore's closure based on evidence that homosexuals congregated there to engage in sexual acts -- even though there was "no evidence" that the store sold obscene material -- because the closure was "based on criminal activities occurring at the site." 323 S.E.2d at 89.

Indeed, other cases have upheld closure of bookstores under abatement of nuisance statutes because of illegal conduct unrelated to expression. See e.g. Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923 (1975), dismissing the appeal from State ex rel. Ewing v. "Without a Stitch", 307 N.E.2d 911 (Oh.1974); State, ex rel. Kidwell v. U.S. Marketing, Inc., 631 P.2d 622, 25 ALR 4th 381 (Id. 1983), jurisdiction

noted 454 U.S. 1140, 71 L.Ed.2d 291, 102 S.Ct. 996, and appeal dismissed by U.S. Marketing, 455 U.S. 1009, 71 L.Ed.2d 878, 102 S.Ct. 1649 (the Supreme Court of Idaho held that a one-year closure order under a nuisance abatement statute for a leased bookstore property did not constitute an unlawful prior restraint on speech.)[2] These cases, like ours,

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[2] This Court sought to address the issue of closure as a remedy in obscenity nuisance orders in Kidwell, supra, jurisdiction noted, 454 U.S. 1140 (1982). After an arson fire destroyed the bookstore, its owners filed for unilateral dismissal of their appeal, which was granted by the Clerk over the objection of the State of Idaho. 455 U.S. 1009 (1982). This was not a dismissal "by stipulation of parties," as indicated in Avenue Book Store v. City of Tallmadge, Ohio, 459 U.S. 997, 74 L.Ed.2d 393 at 394 (1982) (Justice White dissenting from denial of writ of certiorari). See also: U.S. Marketing v. Leroy, 524 F.Supp. 1277 (D.Idaho 1981).

are situations where speech is interfered with incidentally during punishment for past illegal and unprotected conduct.

It is readily apparent that simply because a person's speech is restrained or inconvenienced as the unintended and incidental result of a legitimate statute does not create an unconstitutional prior restraint on speech. As with most criminal statutes, every one of the predicate offenses under any RICO statute can arguably result in incidental suppression of speech. This is particularly so if the property used in the racketeering activity is a store that sells expressive materials. Petitioners' interpretation of the First Amendment would lead to the absurd result of invalidating use of

RICO whenever criminals put their money into such an "enterprise," and for that reason should be overturned. United States v. Powers, 307 U.S. 214, 217, reh'g denied, 308 U.S. 631 (1939).

The criminal nature of an "enterprise" can be proven as neutrally through sale of illegal obscenity as through sale of illegal drugs, guns, or forged documents (which is also speech). As long as the legislation is directed at unlawful conduct, and not motivated by suppression of speech, its purpose cannot be frustrated because the criminal activity is intertwined with expression.

Like prostitution in Arcara, the sale of obscenity is illegal conduct that a state may prohibit. Roth v. United States, 354 U.S. 476 (1957). The Indiana RICO statute is narrowly

drawn in its application since it imposes sanctions only on the sellers of obscenity, defining obscenity by the Miller standard.[3] As the Indiana Supreme Court recognized below, the state has an important societal interest in halting the flow of money into organized crime from the sale of obscenity. Goldsmith, 504 N.E.2d at 564. Any alleged impact on non-obscene pornography is incidental to that interest. See Arcara, 926 L.Ed.2d at 577, 578. It is not the motive or purpose of the law. Thus, even if the sale of pornography is intertwined with the sale of obscenity and is incidentally impacted, the result is not an unconstitutional prior restraint.

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[3] See Ind. Code § 35-49-2-1 defining obscene matter using the Miller test.

cf. Arcara, supra; Cox, supra.

B. First Amendment interests are adequately protected by forcing the prosecution to prove the predicate offense of obscenity before defendants can be convicted of racketeering.

It is critical to recognize that no one can be convicted of "racketeering" in this context until they have been proven guilty of selling illegal, unprotected, obscene matter. The Indiana obscenity statute clearly passes constitutional muster. Sedelbauer v. State, 428 N.E.2d 206 (Ind. 1981), cert. denied, 455 U.S. 1035 (1982); Ford v. State, 394 N.E.2d 250 (Ind.App. 1979). The Indiana obscenity statute gives "adequate warning of the conduct proscribed" so as to permit the law to be fairly administered. See Roth v.

United States, 354 U.S. 476, 491 (1957).

By requiring the state to meet the initial burden of proving the obscenity offense, it is established that a defendant is engaged in an illegal, unprotected activity. It should make no difference what criminal activity triggers the RICO sanctions or what "enterprise" the profits have been poured into. The intent is not to suppress speech, but to deter racketeering activities. Selling "obscene" matter has no more constitutional protection than any other RICO predicate offense.

CONCLUSION

For the foregoing reasons this Court should uphold the decision of the Indiana Supreme Court in 4447 Corp. v.

Goldsmith, 504 N.E.2d 559 (Ind. 1987) and find that the Indiana RICO law, as applied to obscenity offenses, passes constitutional muster.

Respectfully submitted,

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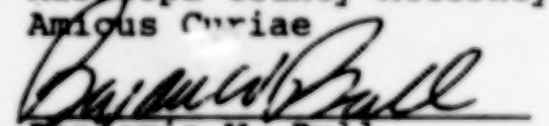
By: 
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BRIEF AMICUS CURIAE OF BOB CORBIN AS ATTORNEY GENERAL OF THE STATE OF ARIZONA IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

Bob Corbin is the duly elected Attorney General of the State of Arizona. As Amicus herein, he has a fervent interest in the outcome of this case. He seeks guiding rules of law to enable himself and other prosecutors in Arizona to constitutionally enforce the Arizona RICO statutes, A.R.S. § 13-2301 et seq., in conjunction with Arizona's felony obscenity statutes, A.R.S. § 13-3501 et seq.

The application of Arizona's RICO laws to obscenity is the subject of State v. Feld, 155 Ariz. 88, 745 P.2d 146 (Ariz. App. 1987), cert. denied, ____, U.S.___, 99 L.Ed.2d 482 (3-28-88), which is now pending in the Superior Court of Maricopa County and may be directly affected by this Court's disposition of the instant Indiana

cases. Like Indiana and the several other states with racketeering statutes which include obscenity offenses as predicate crimes, Arizona patterned the organized crime laws upon the federal RICO statutes, 18 U.S.C. § 1961 et seq.

Due to the gross misrepresentations of law and fact contained in the Petitions for writs of certiorari and the briefs for Petitioners herein, your Amicus desires to submit his position on the Scope and Standard of Review and the Constitutionality of Remedies involved in this review of the Indiana cases, its RICO/CRRA statutes, and the Opinion of its Supreme Court and Court of Appeals.

SUMMARY OF ARGUMENT

I. SCOPE AND STANDARD OF REVIEW

The Indiana racketeering statutes are not facially unconstitutional under the test of Watson v. Buck, and are capable of constitutional application to the predicate offense of obscenity. As applied in the Indiana Supreme Court cases below, the civil forfeitures were limited to preservation of assets for a brief period until a prompt trial could have been held. In the criminal case from the Indiana Court of Appeals, the only remedy sought was conviction for the racketeering acts of distributing obscenity. These cases all involve hard-core pornography and no other application of RICO laws is before the Court.

II. CONSTITUTIONALITY OF REMEDIES

The facts before the Court show these cases to be consistent with other criminal and civil applications of RICO laws to other predicate offenses. These cases are still in their pre-trial stages and further construction and fact finding would have been necessary to decide on appropriate remedies to be granted to the State of Indiana. Any hypothetical applications which could be considered overbroad or vague are not before the Court and were not sanctioned by the Indiana Supreme Court and Court of Appeals. Other federal and state obscenity and RICO cases would have guided and limited the application of the RICO remedies below, and the First Amendment nature of obscenity cases does not preclude the progress of fashioning a remedy for obscenity offenses under

RICO. Due Process is well established in these cases and the state courts must be presumed to be willing and ready to follow such precedent.

Assets of businesses corrupted by obscenity should be subject to forfeiture and restraining orders, since a racketeering enterprise is merely a tool of the crime and a conduit or depository of ill-gotten gains which should be reformed under RICO. When applied by the courts, as was done below, RICO laws can effectively punish the obscenity offenders and their property without unreasonable restraint or chill on legitimate expression. The only logical chill to be expected would be for other businesses to cease traffic in the types of illegal materials found obscene and a predicate to these RICO actions. Since these all involve hard-core pornography, the only chill

could be against the same or similar materials and this would be a reasonable result. No such chill has yet occurred, but the law is entitled to have such a reaction in order to obtain compliance with valid obscenity laws in the face of a major law enforcement problem.

LAW AND ARGUMENT

I. SCOPE AND STANDARD OF REVIEW: THE INDIANA RACKETEERING STATUTES ARE FACIALLY CONSTITUTIONAL AND SHOULD NOT BE INVALIDATED UNDER THE CIRCUMSTANCES PRESENT IN THESE CASES.

A. The Indiana Racketeering Statutes Under Review Must Be Evaluated In Light Of The Opinion Of The Indiana Supreme Court As Applied To Facts Proven Below And Not On Hypothetical Exaggerations.

Many years ago, this Court announced a rule of deferring to state courts the interpretation of state statutes. Watson v. Buck, 313 U.S. 387, 401-02 (1941). The one exception to this wise rule, so much ignored in present-day actions under 42 U.S.C. § 1983 (See Appendix A), was set out at 402:

> It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in

> every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

The Supreme Court of Indiana, and the Court of Appeals of Indiana, reviewed these cases in light of the First Amendment to the U.S. Constitution to determine whether the "statutes constitute facially unconstitutional prior restraints in their application to the predicate offenses of obscenity". 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 560 (Ind. 1987). State v. Sappenfield, 505 N.E.2d 504, 506 (Ind. App. 1987)[1] Petitioners disagree with the conclusion of the Indiana courts that the RICO/CRRA[2] statutes do not violate

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[1] Hereinafter referred to as "4447 Corp." and "Sappenfield".

[2] "RICO/CRRA" refer to Indiana's 1980 Racketeer Influenced and Corrupt Organizations Act (Ind.Code § 35-45-6-1 et seq.) and Civil Remedies for Racketeering Activity statute (Ind.Code § 34-4-30.5-1 et seq.).

the U.S. Constitution, but it is untrue that the state courts below found the statutes "immune from First Amendment scrutiny". Brief for Petitioner Fort Wayne Books, Inc., at 22; [3] Brief for Petitioners (Sappenfield, et al.), at 15-16.[4] This was but the first of the many exaggerations of law and fact proposed by Petitioners in their briefs. Others border on the hysterical and absurd. This Court, however, cannot review these cases so capriciously. The Supreme Court of Indiana gave an authoritative construction to these laws and remanded the cases for trial, further hearings, and further applications to the facts to

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[3] Hereinafter referred to as "Fort Wayne Brief".

[4] Hereinafter referred to as "Sappenfield Brief".

be later proven in the trial courts. As stated in 4447 Corp., at 566-567:

> The Marion Circuit Court entered its ex parte seizure order upon a showing of probable cause to believe a violation of the RICO statute involving the property in question had occurred. As we construe the RICO statute, a showing of prior convictions for the alleged obscenity violations was not required. In order to prevail in the forfeiture action, appellee Goldsmith will of course have to show the existence of the obscenity violations in order to prove a violation of Ind.Code § 35-45-6-2 has occurred. It is at trial on the forfeiture and other requested CRRA remedies that the question of whether the materials are obscene will be litigated. A final determination of that question was not necessary at the hearing on the petition for seizure. [Id. at 566.]

* * *

> At the point a seizure order is entered there has been a judicial determination that there is probable cause to believe violation of Ind.Code § 35-45-6-2 involving the property has occurred. The reason for an adversary

hearing on the seizure of the property would be to determine whether the property had been unlawfully seized. Generally, a defendant would initiate such action by the filing of a motion to vacate the seizure order, as was done in the instant cases, and we would expect the court to hold a prompt adversarial hearing on such a motion. If no motion to vacate is filed, or if the motion is denied, there will be a full adversarial hearing on the merits of the forfeiture action. Although Ind.Code § 34-4-30.5-3(a) does not specifically provide a time frame for that hearing, we would interpret the statute to require the hearing on the question of forfeiture to be held within a reasonable time.

Thus a defendant whose property has been seized pursuant to Ind.Code § 34-4-30.5-3(b) is afforded due process by a prompt adversarial hearing on a motion to vacate the seizure order and/or by a hearing on the question of forfeiture held within a reasonable time after the CRRA complaint and petition for seizure have been filed. In the instant case, appellants were afforded a hearing on their motions to dismiss the complaints and to vacate the seizure orders. Because the proceedings were

halted by the filing of the interlocutory appeals, there has been no opportunity for trials on the merits of the CRRA complaints. At this stage we can discern no violation of appellants' due process rights.

Transfer is granted and the opinion of the Court of Appeals is vacated. The causes are remanded for further proceedings not inconsistent with this opinion. [Id. at 567.]

B. The Operation And Effect Of The Indiana Racketeering Statutes, When Involving The Predicate Offense Of Obscenity, Has Been Given Limiting Construction By The Courts Below To Avoid Unconstitutional Applications.

The granting of the Petitions for writs of certiorari in these cases, 99 L.Ed.2d 268, may have been improvident, for want of jurisdiction as not final judgments within 28 U.S.C. § 1257, Flynt v. Ohio, 451 U.S. 619 (1981). Nevertheless, this Court is still bound by the interpretations placed on the state laws by the courts below (and by further

constructions that could and would take place in the "future proceedings" in the trial court and on re-appeal), and this Court must review the Indiana RICO/CRRA statutes as if originally written in the way construed. Guaranty Trust v. Blodgett, 287 U.S. 509, 513 (1933); Kingsley Pictures v. Regents, 360 U.S. 684, 688 (1959); Mishkin v. New York, 383 U.S. 502, 507-08, 510-11 (1966); U.S. v. 37-Photographs, 402 U.S. 363, 369-73 (1971); Ward v. Illinois, 431 U.S. 767, 772-73, 776 (1977); Metromedia v. San Diego, 453 490, n.26 (1981); Brockett v. Spokane Arcades, 472 U.S. 491 (1985) ("Brockett II").

In so doing, the "substantial overbreadth doctrine" applies. Broadrick v. Oklahoma, 413 U.S. 601 (1973); Village of Hoffman Estates v. Flipside, 455 U.S. 489, 494-95, n.5 (1982); New York v. Ferber, 458 U.S.

747, 772 (1982); Brockett II, supra at 503-04, n.12 (1985).

Amicus submits that obscenity statutes are not "pure speech" regulations, as are political or religious dialog or verbal expression cases. As held in People v. Souter, 178 Cal.Rptr. 111 (Ct. App. Cal. 1981), paying actors and actresses to engage in explicit sex acts before a camera in order to produce pornography is a violation of prostitution and pimping statutes. See also: People v. Fixler, 56 Cal. App.3d 321, 128 Cal. Rptr. 363 (1976); People, ex rel. Van De Kamp v. American Art Enterprises, 75 Cal. App.3d 523, 142 Cal. Rptr. 338 (1977); People v. Kovner, 409 N.Y.S.2d 349 (N.Y. Cty., Sup.Ct., 1978); People, ex rel. Van De Kamp v. American Art Enterprises, 177 Cal. Rptr. 776 (Cal. App. 1981); State, ex rel. Sensenbrenner v. Adult Book Store, 26

Ohio App.2d 183, 271 N.E.2d 13 (Franklin County, 1971), aff'd 35 Ohio St.2d 220 (1973), cert. denied 421 U.S. 934 (1975). The distribution of such hard-core pornography is therefore exploiting the work of prostitutes, and is at least a mixture of conduct and speech. Modern hard-core pornography should not be elevated to the protected class which political, and religious expression deserves. In the obscenity law area, the rule of substantial overbreadth should apply, as stated in Watson v. Buck, supra at 402, and as this Court stated in Hoffman Estates, 455 U.S., at 494-95, Footnote 5:

> 5. A "facial" challenge, in this context, means a claim that the law is "invalid in toto--and therefore incapable of any valid application."

Corollary to this are the rules ("wait until it's time to look" and "look only at what's before you")

discussed and followed in Brockett II, at 501-02:

> We call to mind two of the cardinal rules governing the federal courts: "'[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" United States v. Raines..., quoting Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration... Citing a long line of cases, Raines also held that "[a]ndred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

Amicus urges the Court to keep these principles at the forefront of this review. The Petitioners and the Amicus in their support argue this case as a picture of Armageddon, but it is

presented through the looking glass. Other state courts and legislatures nationwide are watching and we also deserve the reasonable review to which the Supreme Court of Indiana is entitled.

II. CONSTITUTIONALITY OF REMEDIES: UNDER THE CIRCUMSTANCES PROVEN TO THE COURTS BELOW, THE INDIANA RICO/CRRA STATUTES WERE APPLIED CONSTITUTIONALLY TO THE PRESENT POINT IN THESE CASES AND DUE PROCESS MUST BE EXPECTED TO CONTINUE.

The facts proven and presented to the courts below are set out in the Indiana Supreme Court opinion, 504 N.E.2d at 561-63, and in the Indiana Court of Appeals opinion, 479 N.E.2d at 580-83. They show that this case is still at the pre-trial stage where motions are pending by the State for temporary seizure of assets and by the

Defendants to modify or vacate the seizure orders.

In Indianapolis, based on a Complaint and Affidavits which seek to prove the obscenity predicates within the civil trial, the Trial Court ordered the two operating stores to preserve the status quo by listing their property and securing their business equipment. The third, yet unopened, store was ordered sealed until the trial, which was set for 72 hours after the temporary restraining orders were signed. The two open stores continued to operate and sell their hard-core pornographic materials. Thereafter, motions by Defendants delayed the trial and the resolution of pre-trial issues and resulted in this interlocutory appeal by the Defendants at their request. The Court of Appeals stayed the padlock order on the assets of the third store,

as well as the inventory and restraining order on the other two stores, so there was no pending Trial Court order restraining Defendants in Indianapolis when the matter was heard in the Indiana Court of Appeals and Supreme Court. The Indianapolis Defendants, 4447 Corporation, et al., abandoned their appeal after the Indiana Supreme Court decision and have not petitioned this Court for review, but further proceedings would be bound by the decision of this Court and any further mandate of the Indiana Supreme Court thereafter.

In Fort Wayne, the civil Complaint showed 39 criminal convictions at three stores to establish the predicate illegal activity and the Trial Court ordered assets seized pending disposition. After Defendants' motions to vacate or modify the orders

were heard and denied, the police seized the assets. After the Trial Court denied a second set of motions for return, Defendants sought and received an interlocutory appeal so their cases could be consolidated with the pre-trial appeal from Indianapolis that was then pending in the Court of Appeals. One year later, but before it released its opinion, the Court of Appeals granted a stay in the Fort Wayne cases and the stores were allowed to re-open. Therefore, there were no restrictions on the Fort Wayne stores at the time the Court of Appeals ruled and the cases went to the Indiana Supreme Court. This remains the status of these cases to this day.

The companion cases of Ronald and Connie Sappenfield and the Fantasy One and Two stores are purely criminal RICO informations alleging the RICO offenses

and the predicates of obscenity law violations to be proven at the criminal trial or trials. After the Court of Appeals (Fourth District) ruled the RICO/CRRA statutes inapplicable to obscenity offenses (in 4447 Corp. v. Goldsmith, 479 N.E.2d 578 (Ind. App. 4th Dist. 1985)), the Trial Court dismissed the RICO charges and the State appealed to the Indiana Court of Appeals (First District), which reversed after the decision of the Indiana Supreme Court (in 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987). State v. Sappenfield, 505 N.E.2d 504 (Ind. App. 1st Dist. 1987)). No asset seizures were sought or ordered in those cases.

Being the first uses of Indiana's RICO/CRRA statutes in obscenity crime contexts, these cases necessarily required careful attention from the Trial Courts involved. The trial in the

Indianapolis case had been set for 72 hours after the Complaint was filed, and the Fort Wayne case was delayed by defense motions so no trial date could be set. Although Petitioners, Fort Wayne Books, Inc. and the Sappenfields and Fantasy stores, make hypothetical assertions about the effect of the pre-trial orders in the Fort Wayne and Indianapolis civil cases, and the very filing of the criminal charges in No. 87-614, the cases must be limited to their posture and the facts presented below. These cases all involve so-called "adult bookstores" that sell nothing but hard-core pornography. These are <u>not</u> legitimate theaters showing "Hollywood" movies rated "PG" or "R", <u>not</u> general public bookstores like B.Dalton or Waldenbooks selling cookbooks, fiction, sports, reference, etc., and <u>not</u> chains of stores with

mixed goods like food, sundries, and magazines or films, like convenience and grocery stores. A review of the civil pleadings, affidavits, and criminal information shows these businesses engaging solely in pictorial materials of explicit sex acts.

The State prosecutors asked for several RICO and CRRA remedies in the civil cases and only for criminal penalties upon conviction in the criminal case. Whether any of these remedies, or any others, would have been granted would depend on the proof and disposition at trial and on further construction of the statutes and evaluation of applicable remedies by the Trial Courts below, had the cases proceeded either before or after the Indiana Supreme Court ruled.

This Court would normally reserve ruling on pre-trial issues, Flynt v. Ohio, supra, but it must also be remembered that the Trial Courts would have followed the Indiana Supreme Court decision on the issues decided in 4447 Corp. The Trial Courts would further have to consider the other issues, arguments, and precedents for remedies and procedures not covered by 4447 Corp.

In both Fort Wayne and Indianapolis, only one pre-trial ex parte order was issued, for temporary asset seizure, yet the Trial Courts devoted significant effort to the resolution of motions on several novel and complicated issues before the appeals were certified. None of the other remedies prayed for (affecting licenses, other assets, business continuation, etc.) were reached at those pre-trial stages.

Trial courts must continue to interpret, limit, construe, and apply the procedures and remedies to the specific facts, in light of the special First Amendment considerations attending every obscenity-related case. As an example, the stages of trial court resolution of proof, guilt, punishment, forfeiture, and procedure issues by the U.S. District Court in the first federal obscenity RICO action is illustrative. See the several decisions of the Eastern District of Virginia in United States v. Pryba, et al., 674 F.Supp. 1502 (Oct. 8, 1987) (re: conflict of counsel); 674 F.Supp. 1504 (Nov. 3, 1987) (constitutionality of RICO in obscenity cases, forfeiture, prior restraint, punishment, due process, ex post facto) (cited in Fort Wayne Brief at 25); 674 F.Supp. 1518 (Nov. 18, 1987) (standard of proof, proof of obscenity); Order of

Forfeiture, Order of Nov. 18, 1987 (unreported) (copy in Brief for Petitioner Fort Wayne Books (Fort Wayne Brief), Appendix B, App. 9) (post-trial forfeiture Order of related assets upon jury verdict, rights of innocent third parties); 678 F.Supp. 1218 (Jan. 20, 1988) (motion for acquittal, sufficiency of evidence); 678 F.Supp. 1225 (Jan. 29 and Feb. 12, 1988) (inadmissibility of certain polls, community standards of "acceptance" vs. "tolerance" or availability); 680 F.Supp. 790 (Mar. 8, 1988) (state obscenity conviction admissible).

A similar process was begun in these cases. The Indiana courts cannot be presumed to have intended to refuse to consider prior restraint and due process issues as the cases proceeded. As in Pryba, the remedies to be applied below would be limited to the special

circumstances presented in each case. The stores in Fort Wayne and Indianapolis were all devoted to hard-core pornography and the Trial Courts should have found, as they did, that their assets needed to be preserved while the determinations of liability and forfeiture were determined as soon as possible.

A. The RICO/CRRA Remedies Of Closure And Forfeiture May Constitutionally Be Applied To Business Enterprises Which Have Been Corrupted By Violations Of Obscenity Statutes As Well As To Businesses Corrupted By Other Predicate Crimes.

The State in each of the civil cases below assumed the burden of proving the illegal obscenity predicates, and the restraining-seizure orders were intended to preserve the assets only for the brief period until the prompt trial could have been held.

Therefore, the requirements for due process were met as set out by the Court in Southeastern Promotions v. Conrad, 420 U.S. 546, at 560 (1975).

As pointed out by the Indiana Supreme Court in 4447 Corp. at 564, and by the Court of Appeals in Sappenfield at 505, the RICO acts are designed as strong medicine against the epidemic of organized crime involvement in the hard-core pornography racket, as they are in other activities of organized crime. See also: Russello v. U.S., 464 U.S. 16, 26-28 (1983). The central theory of RICO is that the corruption of a business through crime, whether drugs, prostitution, arson, or obscenity, make that enterprise subject to treatment as an unlawful depository of economic interests. Once corrupted, such an enterprise may be treated as having assets subject to forfeiture to prevent

unjust enrichment from contraband. See: U.S. v. 37 Photographs, 402 U.S. 363, 376-77 (1977). In this regard, the pre-trial seizure and restraining orders in Fort Wayne (and Indianapolis) were consistent with other orders to preserve assets pendente lite, even though final forfeiture cannot attach until after verdict and proof of the related nature of each asset to the crimes proven. See: U.S. v. Ginsburg, 773 F.2d 798, 800-03 (7th Cir. 1985), U.S. v. Roberts, 749 F.2d 404, 409-10 (7th Cir. 1984); U.S. v. Lizza Indust., 775 F.2d 492, 497-99 (2nd Cir. 1985); U.S. v. Zielie, 734 F.2d 1447, 1458-59, 1462-63 (11th Cir. 1984); U.S. v. McManigal, 708 F.2d 276, 283-90 (7th Cir. 1983); U.S. v. Martino, 681 F.2d 952, 954-59 (5th Cir. 1982); U.S. v. Godoy, 678 F.2d 84, 86-88 (9th Cir. 1982).

Such pre-trial seizures or restraining orders against assets, of whatever kind, differ from nuisance abatement actions where the only element of the nuisance is the sale of obscene items. RICO acts require additional elements of proving the enterprise, the illegal use of the enterprise to profit from criminal activity, and the relation back of the assets to the racketeering. A business is not "closed" because of past sales of obscenity, as in State, ex rel. Kidwell v. U.S. Marketing, 631 P.2d 622 (Id. 1983), juris. noted at 454 U.S. 1140, app. dismissed by U.S. Marketing (over the State of Idaho's objection to the Clerk of this Court) at 455 U.S.1009 (contrary to the assertion in Avenue Book Store v. Tallmadge, 459 U.S. 997 (1982) (Justice White dissenting) that it was "by stipulation"), but is merely subject to orders preserving

jurisdiction over assets for a brief period until the trial court can determine the propriety of forfeiture of illegal proceeds of racketeering. Although the final closure in nuisance actions is proper, as in Kidwell, supra, without offending Vance v. Universal Amusements, 445 U.S 308 (1980), other final remedies are also possible within constitutional limits, as in Tallmadge, supra (enjoining future sales of "obscenity") or State, ex rel. Ewing v. "Without A Stitch", 37 Ohio St.2d 95, 307 N.E.2d 911 (1974), appeal dismissed f.w.o.s.f.q. 421 U.S. 923 (1975). See also: Spokane Arcades v. Brockett, (Brockett I), 631 F.2d 135, at 139 (9th Cir. 1980), aff'd. 454 U.S. 1022 (1981).

How an enterprise is proven to have been corrupted is unrelated to what type of enterprise it is. 4447 Corp. at 565. The aim of the statutes is to prevent

criminals from intentionally using a business scheme to make, launder, or dispense proceeds of illegal acts and to punish such unfair business practices by divestment of such poison fruit. See: U.S. v. Thevis, 474 F.Supp. 134 (N.D. Ga. 1979); U.S. v. Conner, 752 F.2d 566, 575-78 (11th Cir. 1985); U.S. v. Cauble, 706 F.2d 1322, 1345-49 (5th Cir. 1983); U.S. v. Martino, supra at 960-61; U.S. v. Grande, 620 F.2d 1026, 1037-39 (4th Cir. 1980); U.S. v. Huber, 603 F.2d 387, 392-97 (2nd Cir. 1979). Trial courts require flexibility to avoid constitutional problems yet preserve the power to apply effective sanctions in appropriate cases. U.S. v. Busher, 817 F.2d 1409, 1413-16 (9th Cir. 1987). State and federal law enforcement needs the RICO laws to deal with the controlling parts of the hard-core obscenity industry and "must

be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems". Young v. American Mini Theatres, 427 U.S. 50, 71 (1976).

The existence of the many decisions, limiting and shaping the RICO remedies to provide a firm fairness in individual situations, strengthens the constitutionality of the state and federal laws in the obscenity area. The state courts will be guided by these principles and fashion remedies in ways that are as consistent as possible. These trial court decisions will then be reviewed on appeal to further guarantee their propriety. The non-final orders and proceedings in the Indiana courts below should have an opportunity to develop under the facts of each case and further add to the law of RICO as applied to obscenity. The complexity of this task is more reason to let the

state courts develop these issues rather than a reason to interfere. Moore v. Sims, 442 U.S. 415, 427, 429-30 (1979).

The hypothetical grounds presented by Petitioners herein require this Court to presume unconstitutional interpretations by the Indiana courts. This was the error of the Ninth Circuit in Brockett v. Spokane Arcades (Brockett II), 472 U.S. 491 (1985), and this Court correctly ruled that the first inquiry should be whether the statute would receive an invalid interpretation or application in the trial courts and if so to declare such use improper and only enjoin such use, or excise such provision, if an unlawful use is the only probable or possible use forseeable. If a reviewing court cannot say that a trial court will violate the constitution, it must presume due process will be afforded and allow the

cases to proceed. If the court finds that the trial court will or could make unconstitutional applications then the correct interpretation should be declared and presumed to be honored. McCarthy v. Briscoe, 553 F.2d 1005, 1007 (5th Cir. 1977). Only if an invalid use is unavoidable, such as with a wholly unsavable statute under the Watson v. Buck test or a grievous fact situation as in Dombrowski v. Pfister, 380 U.S 479 (1965), should the reviewing court sever part of the law, or engage in partial invalidation, or enjoin or forbid certain applications. Brockett II, supra at 502-05. This is especially pertinent in pre-trial proceedings. Flynt v. Ohio, supra at 622.

A common thread in the Brief for Petitioner Fort Wayne Books is the exaggerated reach or possible reach of RICO and its enormous chilling effect.

In the Fort Wayne Brief at 13 and 23-24, the assertion is voiced that the Indiana Supreme Court sanctioned the closure of all stores in a chain if two copies of any item are found obscene. The state Supreme Court's opinion in 4447 Corp. at 564 and 566-67, reads otherwise and requires proof of a nexus between the racketeering acts and the remedies granted. Such an absurd situation was not even before the Indiana Supreme Court, much less discussed or approved. The facts before the Court below involved proof that certain stores were connected to related and illegal sales of obscene items and these stores had assets directly related to those illegal acts.

It is inconceivable that any court would order the closure or seizure of other stores or assets not proven to be connected to the specific

offenses proven. In light of the prior decisions of this Court and the federal courts cited above, it is unreasonable to assume, even "for the sake of argument", that a court would be willing to find two sales of a magazine or two rentals of a film to permit seizure of all (or even any other) stores or their inventories or business equipment. All the stores and Defendants below were specifically connected with several specific crimes involving hard-core obscenity. In this context the Indiana courts began to fashion the due process needed to safeguard the State's rights to effective application of state law while also safeguarding against unconstitutional prior restraint. Some restraint is always required by law, and deterrence of crime is a legitimate function of even obscenity statutes. Polykoff v. Collins, 596 F.Supp. 584,

591 (D. Ariz. 1984), aff'd. 816 F.2d 1326 (9th Cir. 1987). See also: Vance, supra at 324-25 (Justice White dissenting). This is more than obvious in the modern world where obscenity offenses are not only necessary but inherent in the traffic in hard-core pornography by today's porn industry.

As this Court recognized in Russello, supra at 24-27, new weapons, broadly defined, are needed to combat this national disgrace, or else "whole areas of organized criminal activity would be placed beyond" the law. The old maxim that "the law is presumed to know what everyone knows" is embodied in the historical treatment by this Court of "hard-core pornography" as an obvious form of unprotected criminal obscenity. From Roth v. U.S., 354 U.S. 476 (1957), through Manual Enterprises v. Day, 370

U.S. 478, 489 (1962), to Miller v. California, 413 U.S. 15 (1973), this Court has used "hard-core pornography" as a shorthand term for "obscenity". Where penetration is clearly visible, such "PCV porn" is such that everyone knows it when they see it. See also: Taylor, "Pornography and the First Amendment", Criminal Justice Reform, chapter 11 (D.C.: Free Congress Research and Educational Foundation, 1983); Milligan, "Obscenity: Malum in Se or Only in Context: The Supreme Court's Long Ordeal", 7 Capitol Univ. Law Rev. 631 (1978).

In Mishkin v. New York, 383 U.S. 502, at 506-08 (1966), this Court noted that New York courts had limited their obscenity statute to reach only "hard-core pornography" and that this limitation "is more stringent than the Roth definition" and therefore "the

judgment that the constitutional criteria are satisfied is implicit in the application of" New York's statute. (Emphasis added.) See also: U.S. v. West Coast News, 357 F.2d 855, 857 (6th Cir. 1966); State v. Voshart, 159 N.W.2d 1, 6 (Wisc. 1968); Woodruff v. State, 273 A.2d 436 (Md. App. 1971); Whiting v. Roxy, Ltd., 293 N.E.2d 889, 891 (Ohio C.P. 1973); Zeitlin v. Arnebergh, 383 P.2d 152 (Cal. 1973); 5297 Pulaski Highway v. Perryville, 519 A.2d 206, 214 (Md. App. 1987). And see: Peters v. State, 449 N.E.2d 311, 312-13 (Ind. App. 1983).

The use of the "hard-core rule" gives limitation and guidance to obscenity-RICO actions (as in the cases below, 4447 Corp. and Sappenfield, and Pryba, supra) as surely as the previous obscenity decisions in Illinois gave guidance on what was known as obscene in

that state. See: Ward v. Illinois, 431 U.S. 767, at 771-73 (1977). The "vagueness" of the "Miller Test" and scienter rules, as they apply in Indiana obscenity law (See: Sappenfield Brief at 25-30, Fort Wayne Brief at 53-61) is as absurd in these cases as it was in Ward, supra, and Hamling v. U.S., 418 U.S. 87, 118-23 (1974), in light of the many Indiana obscenity cases interpreting and applying these concepts. See: Van Sant v. State, 523 N.E.2d 229 (Ind. App. 1988); Albright v. State, 501 N.E.2d 488 (Ind. App. 1986); American Booksellers Assoc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd. 475 U.S. 1001 (1986); Saliba v. State, 475 N.E.2d 1181 (Ind. App. 1985); Sedelbauer v. State, 462 N.E.2d 244 (Ind. App. 1984); Richards v. State, 461 N.E.2d 744 (Ind. App. 1984); Sedelbauer v. State, 455 N.E.2d 1159 (Ind. App. 1983); Peters v. State,

supra, 449 N.E.2d 311 (Ind. App. 1983); Porter v. State, 440 N.E.2d 690 (Ind. App. 1982); Isaac v. State, 439 N.E.2d 1193 (Ind. App. 1982); McNeal v. State, 434 N.E.2d 127 (Ind. App. 1982); Sedelbauer v. State, 428 N.E.2d 206 (Ind. 1981), cert. denied 455 U.S. 1035 (1982); State, ex rel Drost v. Superior Court, 416 N.E.2d 1247 (Ind. 1981); American Films v. State, 413 N.E.2d 1091 (Ind. App. 1981); Smith v. State, 413 N.E.2d 652 (Ind. App. 1980); Beach v. State, 411 N.E.2d 363 (Ind. App. 1980); State v. Baysinger, 397 N.E.2d 580 (Ind. 1979), appeal dismissed f.w.o.s.f.q. 446 U.S. 931 (1980); State, ex rel. J.N.S., Inc. v. Municipal Court, 396 N.E.2d 361 (Ind. 1979); Hagood v. State, 395 N.E.2d 315 (Ind. App. 1979); Ford v. State, 394 N.E.2d 250 (Ind. App. 1979); Riley v. State, 389 N.E.2d 367 (Ind. App. 1979);

Massey v. City of Mishawaka, 378 N.E.2d 14 (Ind. App. 1978).

In the face of this wealth of precedent to guide Defendants and the state courts below (See also Appendix B for state RICO cases), Petitioners must be held to their burden to show beyond a reasonable doubt that the Indiana statutes are invalid, incapable of constitutional application, and not entitled to the presumption that they are valid and will be validly enforced. The record in the instant cases shows no facial or applied invalidity that is not or cannot be construed correctly by the Indiana courts. See also: Naked City, Inc. v. Aregood, 667 F.Supp. 1246 (N.D. Ind. 1987); Moore v. Sims, supra at 429-30.

B. The Restraint Upon The Distribution Of Materials Not Adjudicated As Obscene Is

Incidental Only To Those Items Forfeited As Property Assets Of A Corrupt Enterprise And Does Not Amount To An Unconstitutional Prior Restraint Upon Other Materials Or Against The Same Or Similar Items In Commerce At Other Locations.

Petitioners, and their amicus, argue the chilling effect of RICO law on legitimate expression, yet they have offered no proof to the courts below, nor to this Court, that any actual restraint has in fact occurred. The Fort Wayne Brief, at 10, notes that the Indiana Court of Appeals granted a stay that removed the padlocks on the three stores in Fort Wayne which meant they were "allowed to resume operations". Petitioners fail to mention that all three Fort Wayne stores did re-open and one is still operating today, selling hard-core ("PCV") pornography of the type found obscene in the Indiana obscenity cases cited above and in such

cases as Hamling v. U.S., 418 U.S. 15 (1974), and U.S. v. Battista, 646 F.2d 237 (6th Cir. 1981), cert. denied 454 U.S. 1046 (1981) (Deep Throat). The stores in the Sappenfield case were never closed or restrained, the operating stores in Indianapolis were never closed or subject to seizure, and the third store which had assets seized in Indianapolis was released from its restraining order.

The burden should be on Petitioners to prove that unreasonable consequences have followed the RICO statutes, as the parties did in Dombrowski, supra. The truth is that hard-core obscenity is out of control and a major problem for law enforcement. See also: "Project: An Empirical Inquiry into the Effects of Miller v. California on the Control of Obscenity", 52 New York Univ. Law Rev. 928 (1977); "The Pornography Industry",

Boston Globe series of Feb. 13-18, 1983. A question that begs itself from amicus briefs such as from the Video Software Dealers Association (VSDA) and American Booksellers Association (ABA) (See: 99 L.Ed.2d 268), is whether the ABA members desire to distribute hard-core "PCV" pornography (they don't now) and whether the VSDA video rental stores are really chilled if they continue to rent hard-core titles all across the country, as they do. The obscenity laws of Congress and the state legislatures are supposed to prevent and "chill" the traffic in obscenity, and "PCV porn" is not arguably outside that legitimate reach of those statutes.

Within the pornography industry, there are well defined classes of materials. Hard-core pornography consists of "PCV" materials of hetero-and homo-sexual acts, bondage,

sado-masochism, bestiality, etc., as well as the simulated material with genitals displayed but no penetration shown. Both actual and simulated were included as "hard-core" by this court in Manual Enterprises v. Day, supra and Miller, supra at 24-25, but the porn trades usually refer to hard-core as only "PCV" and try to include simulated ("medium core") in with "soft-core". Soft-core pornography rightfully includes only nudity and little or no sexual activity. Only so-called "adult bookstores and theatres", and now many "mom and pop" video stores, carry hard-core "PCV" pornography, whereas legitimate theater chains which show Hollywood movies do not show any "PCV". Cable services such as Playboy Channel show extensive simulated sex ("medium core"), as do many "men's sophisticate" magazines such as Penthouse and Hustler.

Hollywood movies which are rated "R" or "PG" by the Motion Picture Assocition of America (MPAA) show nudity and some brief scenes of simulated intercourse ("soft-core"), like the scenes in Carnal Knowledge, Jenkins v. Georgia, 418 U.S. 153 (1974), as well as magazines such as Playboy and Playgirl. No reported or known obscenity case has been brought under any Miller based federal or state law against any movies rated "R" or "PG" by the MPAA anywhere in the United States and all known cases have involved hard-core materials that explicitly show "PCV" or graphic simulated sex. There has been no unconstitutional chill if the only result of obscenity and RICO laws has been to keep "Hollywood" movies from forcing actors and actresses to perform actual sex acts in MPAA rated movies (which would automaticaly make them "X"). There has not been

sufficient legitimate chill if the video stores and "adult stores and theatres" continue to distribute "PCV" materials. If the effect of RICO and obscenity law enforcement is to convince or force the marketplace to remove hard-core pornography, then this would not be unreasonable under the First Amendment and would be the legitimate aim of such laws. See: Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); Vance v. Amusement Co. 445 U.S. at 324 (Justice White Dissenting); New York v. P.J. Video, Inc., 475 U.S. ___, 89 L.Ed.2d 871 (1986). See also: Agreement for the Suppression of the Circulation of Obscene Publications (1910,1949), 37 Stat. 1511; Treaties in Force 209 (U.S. Dept. State, Oct. 31, 1956), cited in Roth v. U.S., 354 U.S. 476, 485, n.5 (1957). Any unconstitutional chill or prior restraint should be affirmatively

shown by Petitioners and they have failed to offer any proof that any has occurred anywhere. Petitioners really seek permission to engage in the open and notorious traffic in hard-core pornography, and want freedom from the reach of any obscenity laws, especially those which could be the most effecive such as RICO. This Court has already recognized the propriety of obscenity laws, Roth, Miller, Paris, Hamling, supra; Pope v. Illinois, 481 U.S. ___ 95 L.Ed.2d 439, 107 S.Ct. 1918 (1987), and if obscenity is subject to prohibition as a criminal act, or even a civil, quasi-criminal or nuisance violation, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Huffman v. Pursue, 420 U.S. 592 (1975); Art Theater Guild v. Ewing, 421 U.S. 923 (1975), then obscenity should be subject to RICO laws. The First Amendment is protected by the

presumption of protection accorded allegedly obscene materials in the same way criminal defendants are protected in other cases by the presumption of innocence. Once removed by proof beyond a reasonable doubt in criminal cases or by clear and convincing evidence or a preponderance in civil cases, Cooper v. Mitchell Brothers, 459 U.S. 944 (1982), all that is left is an unlawful act. If the presumption of protection were absolute, no temporary seizures on probable cause could occur prior to trial in any obscenity case. P.J. Video, supra; Heller v. New York, 413 U.S. 483 (1973); U.S. v. 12 200-Ft. Reels, 413 U.S. 500 (1973). The statutory and common law elements of proving obscenity and scienter are the due process protections to which pornographers are entitled. These are strict and complicated burdens for the

prosecution, Pope v. Illinois, supra, and total immunity from enforcement is not also warranted.

If the state can show a pattern of racketeering by obscenity offenses, and a relation to a business of assets used in or derived from this illegal pattern, then forfeiture is appropriate. The Indiana Supreme Court was correct in concluding that corruption is not based on how the corruption occurs. 4447 Corp., at 564. The Arizona Court of Appeals in State v. Feld, 745 P.2d 146, 152-56 (Ariz. App. 1987), cert. denied ___U.S.___, 99 L.Ed.2d 482 (1988), upheld the purely criminal sanctions of RICO to obscenity (such as were charged in Sappenfield herein), but felt constrained to eliminate most of the restraining and forfeiture powers except as to the exact items found obscene or the exact dollar amount of those items.

This effectively kills the power of the courts in RICO actions to punish and reform a corrupt business and its operators when caught systematically violating obscenity laws. If a person used drug or prostitution or gambling proceeds to buy and run a bookstore or grocery store, this Court should have no problem allowing forfeiture of the inventories of books and food and any other related interest in the "legitimate" business. This would not be a true prior restraint on those books seized because the government can sell them and all other businesses in the country can sell those books and even the defendants can sell those books elsewhere. Just as the injunction in Avenue Book Store v. City of Tallmadge, supra, adds effectiveness to a nuisance action, rather than enjoining only the specific items found obscene, and just

as a store can be closed for a year after being found a nuisance because its stock in trade is found obscene, State, ex rel. Kidwell v. U.S. Marketing, supra, assets of a racketeering enterprise should be subject to seizure or restraint, and forfeiture, if used to violate obscenity laws. Closure and forfeiture are penalties for corrupting a business, not a direct suppression of the specific books or films then in inventory. Any restraint goes only to those items at that store and is incidental to a proper penalty for a violation of law. Arcara v. Cloud Books, 478 U.S. ___, 92 L.Ed.2d 568, 576-78 (1986). Therefore, Arcara and P.J. Video, supra, support treating obscenity as any other predicate RICO offense and allow reasonable forfeitures of assets or closure of the corrupted business.

CONCLUSION

The Final Report of the U.S. Attorney General's Commission on Pornography (DOJ, 1986; Rutledge Hill Press, 1986), although ridiculed (and rightfully feared) by the pornographers, speaks for itself and outlines the true need for RICO in breaking up the organized crime dominated hard-core pornography syndicates. The "intractable" obscenity problem will not go away if the pornographers have anything to do with it. F.C.C. v. Pacifica Foundation, 438 U.S. 726, at 744, n.19 (1978). Now is the time to guide law enforcement in making effective use of RICO laws against the obscenity industry. Just as law enforcement in Arizona will suffer

greatly under State v. Feld, supra, the whole country will continue to suffer if the Indiana courts are reversed and the RICO laws made ineffective in this national organized crime business.

> This may not be an easy road, free from difficulty. But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale - an absolutist, "anything goes" view of the First Amendment - because it will lighten our burdens.
>
> * * *
>
> "Our duty admits of no substitute for facing up to the tough individual problem of constitutional judgment involved in every obscenity case."
>
> Miller v. California, at 29-30.

Respectfully submitted,

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APPENDIX A

APPENDIX A

History of Three State Obscenity Law Challenges in Federal Courts

Ohio:

Sovereign News Co. v. Falke, 448 F.Supp. 306-408 (N.D. Ohio 1977) ("Sovereign I") (invalidating Ohio obscenity definition and enjoining entire statute); State v. Ronald Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978) (construing and upholding Ohio obscenity statute); Sovereign News Co. v. Corrigan, 610 F.2d 428 (6th Cir. 1979), cert. denied, 447 U.S. 923 (1980) (remanding "Sovereign I" for reconsideration in light of State v. Burgun); Sovereign News Co. v. Falke, C77-230 (N.D. Ohio 1980) ("Sovereign II") (on remand, re-invalidating Ohio law and rejecting State v. Burgun); Turoso v. Cleveland Municipal Court, 531

F.Supp. 829 (N.D. Ohio 1980) (denying habeas corpus, one of six habeas cases where writ granted in four and denied in two); Sovereign News Co. v. Falke, 674 F.2d 484 (6th Cir. 1982), cert. denied, 459 U.S. 864 (1982) (reversing "Sovereign II" and following State v. Burgun); Turoso v. Cleveland Municipal Court, 674 F.2d 486 (6th Cir. 1982), cert. denied, 459 U.S. 880 (1982) (reversing writs of habeas corpus and affirming denials of habeas writs and upholding Ohio statute under State v. Burgun)... (Sovereign News Co. v. Falke dismissed by District Court parties 11-30-82).

Washington:

Spokane Arcades v. Ray, 449 F.Supp. 1145 (E.D. Wash. 1978) (invalidating in toto Washington's new moral nuisance law, Initiative 335), affirmed, Spokane Arcades v. Brockett, 631 F.2d 135 (9th

Cir. 1980), affirmed summarily, Brockett v. Spokane Arcades, 454 U.S. 1022 (1981) ("Brockett I"); Spokane Arcades v. Eikenberry, 544 F.Supp. 1034 (E.D. Wash. 1982) (denying injunction against new moral nuisance statute passed to replace Initiative 335; upholding statute, and abstaining in part), reversed, J-R Distributors v. Eikenberry, 725 F.2d 482 (9th Cir. 1984) (Striking entire state obscenity statute), reversed, Brockett v. Spokance Arcades, 472 U.S. 491 (1985) ("Brockett II")... (The five suits were then dismissed.)

Texas:

Universal Amusement Co. v. Vance, 404 F.Supp. 33 (S.D. Tex. 1975) (21 federal suits throughout Texas ordered consolidated, state obscenity nuisance and search warrant statutes invalidated and all prosecutions enjoined), reversed, King Arts Universal Amusement

Co. v. Vance, 559 F.2d 1286 (5th Cir. 1978) (one of the cases, Dexter v. Butler, was affirmed), King Arts reversed on rehearing en banc, Universal Amusement Co. v. Vance, 587 F.2d 159 (5th Cir. 1978) (Dexter also re-affirmed at 587 F.2d 176) (Texas nuisance statute, as yet unused, invalidated in toto), affirmed, Vance v. Universal Amusement, 445 U.S. 308 (1980). Red Bluff Drive-In v. Vance, 648 F.2d 1020 (5th Cir. 1981) (consolidated challenges to new Texas criminal obscenity statutes-District Courts denied relief-affirmed in part, abstention in part after opinion on merits of statute); Andrews v. State, 652 S.W.2d 370 (Tex. Cr. App. 1983) (construing and upholding statutes and refusing to follow advisory opinion of Red Bluff on definitions).

APPENDIX B

APPENDIX B

State Cases on RICO Actions

Martinez v. Heinrich,
521 So.2d 167 (Fla. App. 1988)

DeRuyter v. State,
521 So.2d 135 (Fla. App. 1988)

State v. Spooner,
520 So.2d 336 (La. 1988)

State v. Champagne,
538 A.2d 193 (Conn. 1988)

People v. Milton,
732 P.2d 1199 (Colo. 1987)

Morgenthau v. Citisource, Inc.,
504 N.Y.S.2d 108 (A.D. 1 Dept. 1986)

State v. Henderson,
717 P.2d 933 (Ariz. 1986)

Banderas v. Banco Central,
461 So.2d 265 (Fla. App. 1985)

State v. 1979 Pontiac Trans Am,
487 A.2d 722 (N.J. 1985)

District Atty. of Queens County v. McAuliffe,
493 N.Y.S.2d 406 (Sup. 1985)

Caldwell v. State,
321 S.E.2d 704 (Ga. 1984)

Waller v. State,
303 S.E.2d 437 (Ga. 1983)

Hampton v. Thurmand,
619 S.W.2d 310 (Mo. 1981)

Bowden v. State,
402 So.2d 1173 (Fla. 1981)

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 1988, three copies of the foregoing Brief Amicus of Bob Corbin, as Attorney General of the State of Arizona in Support of Respondents, were sent by U.S. Mail, postage prepaid, to:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

v.

STATE OF INDIANA, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Indiana

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF JAMES J. CLANCY, AS ATTORNEY AT LAW; PHIL APPLEGATE AND KAREN APPLEGATE, AS PARENTS OF COLLEEN APPLEGATE, ALSO KNOWN AS "SHAUNA GRANT"; AND LINDA MARCIANO, ALSO KNOWN AS "LINDA LOVELACE" IN SUPPORT OF RESPONDENTS

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SUBJECT INDEX

MOTION OF JAMES J. CLANCY, AS ATTORNEY AT LAW; PHIL APPLEGATE AND KAREN APPLEGATE, AS PARENTS OF COLLEEN APPLEGATE, A.K.A. "SHAUNA GRANT"; AND LINDA MARCIANO, A.K.A. "LINDA LOVELACE", FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS 1-6

INTEREST OF AMICUS CURIAE 7

ARGUMENT 18

I

THE RIGHT OF THE STATE OF INDIANA TO PROSCRIBE "OBSCENITY" (HARD-CORE PORNOGRAPHY) AS AN UNLAWFUL BUSINESS PRACTICE, AND AS A COMMON LAW NUISANCE, AND AS A STATUTORY, ILLEGAL "PATTERN OF RACKETEERING ACTIVIITY", IS A "NATURAL LAW" RIGHT WHICH HAS ITS ROOTS IN THE LAWS OF NATURE. UNDER OUR DECLARATION OF INDEPENDENCE AND THE FEDERAL CONSTITUTION, THAT RIGHT IS INHERENT IN STATE GOVERNMENT AND IS IMMUTABLE 18

II

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

v.

STATE OF INDIANA, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Indiana

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

James J. Clancy, Phil Applegate, Applegate, and Linda Marciano hereby move for leave to file the attached brief amicus curiae, pursuant to Rule 36.3 of the Rules of this Court. The reason for the motion is that counsel for amicus curiae has been unable to obtain the timely written consent of counsel for Petitioner Fort Wayne Books Inc. to the filing of an amicus brief. On Friday, July 1, 1988, moving party, Clancy, telephoned Flo, the secretary

to Mr. Weston at (213) 550-7460 and asked her to relay a message to Mr. Weston; namely, that Mr. Clancy requested the written consent of Mr. Weston to file a brief amicus curiae on his own behalf. At approximately 12:45, Flo returned the call with information that Mr. Weston would favorably entertain the request, but would not be available for that purpose until July 7th or later, which is the date such written consent and amicus curiae brief would have to be filed with the U.S. Supreme Court. On July 6th Flo, Mr. Weston's secretary, indicated that Mr. Weston was out of town and would not be available for such signature, whereupon Clancy informed Flo he would move for leave of court to file the within Brief Amicus Curiae.

The interest of moving parties is

set forth in the attached Brief Amicus Curiae at page 1 et seq.

Moving parties believe that the law governing the issues in this case is clearly and adequately set forth in (1) the dissenting opinion of Mr. Justice Conover in the Court of Appeals of Indiana, Fourth District. (See Appendix to Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana at pages App. 80- App. 98); (2) the majority opinion of Chief Justice Givan in the Supreme Court of Indiana (See Appendix to Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana at pages App 1 - App 19); and (3) the recent opinion of Justice O'Connor (in which Rehnquist Blackmun, Scalia, and Kennedy joined) in Frisby et al., vs Schultz and Braun ___ U.S.___ decided June 27, 1988. The Frisby case upheld the Wisconsin ordinance as not facially

invalid under the First Amendment, by construing the ban to be a limited one. In this case, moving parties believe that the civil aspect of the Indiana RICO statute can and should be upheld by a narrowing construction which directs the aim of the statute at the "unlawful business" of obscenity which, at common law, was a well-recognized public nuisance, and at "hard-core" pornography which, under U.S. vs. 37 Photographs, 402 U.S. 363 at 377 is "contraband" under federal law. See, also, the extended discussion of hard-core pornography by Mr. Justice Tobriner in Zeitlin vs. Arnebergh 59 Cal 2d 901, 31 Cal. Rptr. 800 (1963)

Further, as did occur in the arguments in Roth vs. U.S. 354 U.S. 476 (1957), moving parties believe that the focus of this court and its membership should be directed at the very real and

serious nature of the "hard-core pornography" which presently confronts this nation. Moving parties Clancy and Phil and Karen Applegate, parents of Colleen Applegate, also known as "SHAUNA GRANT" have done so by filing with this court a copy of the PBS video educational documentary "Death of a Porn Queen", and time and motion studies and video tape copies of the 29 hard-core pornographic films which were made of their daughter, Colleen Applegate, and time and motion studies and videotape copies of her films ""SUZY SUPERSTAR" and "GLITTER") as recorded from surveillance of the S-2 channel 18 transmissions on March 12, 1988 and March 13, 1988.(See A 26 and A 27, infra) Videotape copies of Colleeen Applegate's 29 films are being sold in neighborhood video stores throughout this nation without any resistance by federal law enforcement, which

believes that this court has given its endorsement to such products.

Moving parties believe that if the Indiana Civil RICO statute is upheld by this court, such will make it possible to end the trade in such unlawful hard-core pornographic films, because this court's action will send a signal to federal law enforcement that their present evaluation is INACCURATE.

July 7, 1988 Respectfully Submitted

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

v.

STATE OF INDIANA, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Indiana

BRIEF OF JAMES J. CLANCY, AS ATTORNEY AT LAW; PHIL APPLEGATE AND KAREN APPLEGATE, AS PARENTS OF COLLEEN APPLEGATE, ALSO KNOWN AS "SHAUNA GRANT"; AND LINDA MARCIANO, ALSO KNOWN AS "LINDA LOVELACE"

INTEREST OF AMICUS CURIAE

James J. Clancy is an Attorney At Law, licensed to practice in the State of California and in this Court. During the past 25 years, Clancy has authored more than 40 amicus curiae briefs in obscenity cases in this

Court. See, for example: Motion of Charles H. Keating, Jr. For Leave to File a Brief as Amicus Curiae in Support of Appellants, with brief annexed in Vance et al v. Universal Amusement Co., Inc., et al., 445 U.S. 308 (1980); Amicus Curiae Brief of the City of Santa Ana, California, in Support of Petitioner in City of Paducah, et al v. Investment Entertainment Inc., et al; October Term, 1986; Amicus Curiae Brief of the City of Santa Ana, California in Support of Petitioners in People of the State of New York ex rel Arcara, District Attorney of Erie County vs. Cloud Books Inc., et al., October Term 1985, No 85-437; Motion of Charles H. Keating, Jr. for Leave to File a Brief as Amicus Curiae in Support of Appellee, Vincent Gilmartin, Mahoning County Prosecutor's Motion to Dismiss or Affirm with Brief Annexed, in Grove

Press Inc., et al. vs Flask et al., October Term 1970, No. 360; Motion of Charles H. Keating, Jr. for Leave to File a Brief as Amicus Curiae in Support of Appellant's Petition for Rehearing with Brief annexed, in Cohen v. State of California October Term, 1970, No. 299.

Clancy has also appeared as Counsel of Record in several unsuccessful efforts to end federal interference with civil obscenity litigation, wherein States have attempted to utilized their civil public nuisance abatement powers to terminate the operations of public theaters and book stores which exhibit and sell nothing but hard-core pornography, 365 days in the year. See, for example, Petition for a Writ of Mandamus or Prohibition in Huffman v. U.S. District Court for the Northern District of Ohio, Western District,

October Term, 1972 No. 72-1613, and the discussion of Solicitor General Robert Bork in "Memorandum for the United States as Amicus Curiae" filed in October 1973 at paragraph 2 on page 3 reading:

> Petitioners' request for mandamus rests primarily upon their claim that the district court lacked jurisdiction of the plaintiff's civil action. Their principal jurisdictional argument is that 42 U.S.C. 1983 permits only suits involving claims of racial or other invidious, class-based discrimination (Pet. 35-38). However, this Court has long recognized that "allegations of fact sufficient to show deprivation of the right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state a cause of action under the Civil Rights Act, whenever it appears that the abridgment of the right is effected under color of a state statute or ordinance." Douglas v. City of Jeannette, 319 U.S. 157, 162.

See, also, Petition for Rehearing in Huffman vs. Pursue LTD. No. 73-296 at pages 2-5 ("The Court's Opinion has failed to consider the threshold

question of the jurisdiction of the federal district court to act on December 1, 1972") and Amicus Curiae Brief of the City of Santa Ana, California in Support of the Appellant in Spokane Arcades Inc. et al vs. Brockett, October Term 1980, No. 80-1604.

Clancy has appeared as Counsel of Record and attorney for Amicus Curiae in several unsuccessful efforts to have this court undertake and decide the constitutional question as to whether a state has the power under its public nuisance abatement laws to terminate the business operations of such theaters and bookstores. See Petition for Writ of Certiorari in People of the State of California ex rel Cooper v. Mitchell Brothers' Santa Ana Theater et al., October Term, No. 81-271 at Question 1:

QUESTIONS PRESENTED

"1. Whether the Court of Appeal erred in upholding the Trial Court's Conclusion of Law XVI that closure of a theater as a public nuisance, after trial on the merits, was prohibited by the United States Constitution as a prior restraint under every set of circumstances, where the Trial Court also concluded that under the trial facts such relief would have been granted as to the Mitchell Brothers' Santa Ana Theater, except for such constitutional prohibitions?";

and Petition for Writ of Certiorari in Edward Cooper vs. Mitchell Brothers' Santa Ana Theater, October Term 1982 No. 82-345 at question 1.

QUESTIONS PRESENTED

"1. Whether an order of a trial court which closes a theater as a public nuisance pursuant to its Equity Powers, after a trial on the merits and as a penalty for a past, continuous, course of unlawful conduct, is a prior restraint which is prohibited by the United States Constitution?"

See, also, Motion to Allow Amicus Curiae City of Santa Ana to Argue in People of the State of New York ex rel

Arcara v. Cloud Books Inc., et al., October Term, 1985, No. 85-437, denied in Arcara v. Cloud Books Inc et al., 478 U.S. 92L Ed 2d 568 (April 7, 1986)

Clancy was also Counsel of Record in the Petition for Writ of Certorari in Clancy et al. v. Jartech Inc., et al., October Term No. 81-2094 which unsuccessfully sought review of Jartech Inc., et al v. Clancy et al.666 F 2d 403 (1982) and the question whether hard-core pornography, which is contraband under 19 U.S.C. Section 1305 (a) as explicated in U.S. v 37 Photographs 402 U.S. 363 at 377, can be granted a valid copyright under the U.S. Constitution.

Phil Applegate and Karen Applegate (the Applegates) are the parents of the late Colleen Applegate, also known as SHAUNA GRANT, who appeared in 29 copyrighted hard-core pornographic films before her death by suicide at

age 20 in March of 1984. The Applegates have appeared in a 60 minute documentary of their daughter's life "Death of an American Girl", broadcast nationwide on educational TV by "FRONTLINE" under the title "Death of a Porno Queen." At the present time, four of Colleen Applegate's films: "SUZY SUPERSTAR", "GLITTER", "PRIVATE SCHOOL GIRLS", and "SHAUNA EVERY MAN'S FANTASY" are being transmitted by Home Dish Only Satellite Networks Inc. from New York City to satellite stations and rebroadcast nationally and internationally by American exxxtasy Channel and Tuxedo Network over Satellite Station S-1 channel 18 and G-2 channel 10 to satellite dishes in the United States and to cable companies for transmission over cable to homes in the United States.

Linda Marciano, also known as "Linda Lovelace" (Lovelace), has

appeared as an actress in the coprighted, hard-core, pornographic film entitled "DEEP THROAT". The account of how Lovelace was forced into participation in the production of "DEEP THROAT" in 1972 is told in "ORDEAL", her autobiography written with Mike McGrady. Lovelace has since rehabilitated herself, is married, has a family, and wants the video tape copies of "DEEP THROAT" seized as federal contraband and destroyed.

As a part of the argument in Roth-Alberts 354 U.S. 476 (1957), the federal attorneys filed with the Clerk of the United States Supreme Court several examples of "hard-core pornography" which the United States Government encountered, as a background to the constitutional issues which had been presented in Roth v U.S. For the same purpose, Amicus herein are concurrently filing with the clerk of

this Court the following Exhibits:

1A, 1B. Two video tapes of the broadcast of S-1 channel 18 on March 12, 1988, including the Colleen Applegate film "SUZIE SUPERSTAR", as surveilled in Niagara County, New York.

2A, 2B. Two video tapes of the broadcast of S-1 Channel 18 on March 13, 1988, including the Colleen Applegate film "GLITTER"; as surveilled in Niagara County, New York.

3. A-C. Three volumes of time and motion studies of 29 copyrighted, hard-core pornographic films in which Colleen Applegate appeared.

4. Copyright search and copyrights for 29 hard-core pornographic films in which Colleen Applegate appeared.

5. A-G. Seven video tapes containing copies of 29 hard-core pornographic films in which Colleen Applegate appeared.

6. Video tape copy of PBS Documentary "DEATH OF A PORN QUEEN" reporting on the background and death of Colleen Applegate at age 20.

Formal complaints alleging "conspiracy" have been filed with United States Attorney General Ed Meese and the chairman of the Federal Communications Commission, requesting that the federal copyrights which have

been issued to the 29 hard-core pornographic films in which Colleen Applegate has appeared be voided, and that the exhibition of these hard-core pornographic films on Satellite Station S-1 channel 18, and G-2 channel 10 be enjoined as obscene and "contraband" under federal law. No action has been taken by those agencies. Amicus Curiae have been led to believe that the refusal of such governmental officals to act on these complaints is due to the past refusal of this court to address this problem definitively. We believe that an affirmative of the Indiana Judgment, upholding the civil provisions of the Indiana RICO statute will change the attitude of the above governmental officials.

ARGUMENT

I

THE RIGHT OF THE STATE OF INDIANA TO PROSCRIBE "OBSCENITY" (HARD-CORE PORNOGRAPHY) AS AN UNLAWFUL BUSINESS PRACTICE, AND AS A COMMON LAW NUISANCE, AND AS A STATUTORY, ILLEGAL "PATTERN OF RACKETEERING ACTIVITY" IS A "NATURAL LAW" RIGHT WHICH HAS ITS ROOTS IN THE LAWS OF NATURE. UNDER OUR DECLARATION OF INDEPENDENCE AND THE FEDERAL GONSTITUTUION, THAT RIGHT IS INHERENT IN STATE GOVERNMENT AND IS IMMUTABLE.

The "right" of The State of Indiana to restrain obscenity is a "natural law" right which is derived from the laws of nature. In expressing the reason for proscribing obscenity in the form of the motion picture film "I Am Curious (Yellow)", the Georgia Supreme Court in Evans Theater Corp et al. v. Slaton, supra, deduced that right from "natural law" reasoning, at page 715:

> "The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code Ann. Section 26-2011 (Ga. L. 1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public." (Our emphasis.)

In People ex rel Busch v. Projection Room Theater, 17 Cal 3d 42 at 54, 130 Cal Rptr 328 at 335 (1976), the California Supreme Court expressly agreed with the Georgia Supreme Court:

> "Each of the above cases either expressly or implicitly recognizes that the exhibition of obscene magazines or films constitutes a public nuisance properly subject to abatement. For example, the Georgia Supreme Court in Evans upheld application of a general public nuisance statute to an allegedly obscene film, "I Am Curious

(Yellow)." The court explained that "if any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public....The exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. The welfare of the whole community is served by restraining the showing of such an obscene film." (180 S.E. 2d at pp. 715-716.)"

It seems clear from the language used in the above opinion, namely: "If any semblance of civilization is retained in our country, the State must have standards of conduct permissible in public" that both courts were talking about "natural law" rights which exist in all governments under the laws of nature, and were deducing from that principal the right of State government to so act.

This inherent "right" of society to restrain obscenity was before this Court in a challenge on first amendment grounds in Roth v. U.S. and Alberts v. California 354 U.S. 476 at 485. There, the Roth Court confirmed the existence of that natural law right by inductive reasoning from the past experience of all governments:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956." (Our emphasis)

The "right" of the Indiana State Legislature to include obscenity violations as a predicate offense, and to determine that obscenity violations should be one of the underlying offenses which may constitute a "pattern of

racketeering activity", as defined in the Indiana RICO statute is a right which is rooted in the "Laws of Nature and of Nature's God" upon which our constitutional rights are based. See Thomas Jefferson speaking in the Declaration of Independence as excepted hereinafter. As such, that right is not subject to attack on the grounds that the purpose of the Indiana RI-CO/CRRA scheme, as it pertains to the predicate offense of obscenity, is "to restrain the sale or distribution of expressive materials." See the opinion of the Indiana Supreme Court at Appen-dix to Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana at page A11. An intellectual argument of this sort flies in the face of the pre-eminent determination in Roth v. U.S. supra, that the right of organized society to proscribe obscenity is a "natural law"

right inherent in all men in all societies. The universal judgment which the majority of the U.S. Supreme Court described in Roth, supra, is nothing less than the immutable laws of nature and the unalienable rights acknowledged by all great philosophers and common law judges from the dawn of Western Civilization and guaranteed to individuals by our federal constitution. See, for example for the following years:

> ca. 340 B.C., Aristotle: Political justice is partly natural, partly legal. Natural justice is that which everywhere has the same force and does not exist by people's thinking this or that (Ethics, v, 7) Particular law is that which each community lays down and applies to its own members.... Universal law is the law of nature. For there really is, as everyone to some extent divines, a natural justice and injustice which binds all men (Rhetoric, i, 13).
>
> ca. 54 B.C., Cicero: Right reason is indeed a true law which is in accordance with

nature, applies to all men,
and is unchangeable and eternal.
By its commands this
law summons men to the performance
of their duties; by
its prohibitions it restrains them
from doing wrong.
Its commands and prohibitions
always influence good
men, but are without effect upon
the bad. To invalidate
this law by human legislation is
never morally right, nor
is it permissible ever to restrict
its operation, and to
annul it wholly is impossible.
Neither the senate nor
the people can absolve us from our
obligation to obey
this law...It will not lay down
one rule at Rome and
another at Athens, nor will it be
one rule today and
another tomorrow. But there will
be one law, eternal
and unchangeable, binding at all
times upon all people;
and there will be, as it were, one
common master and
ruler of men, namely God, who is
the author of this
law, its interpreter, and its
sponsor. The man who
will not obey it will abandon his
better self, and,
in denying the true nature of man,
will thereby suffer
the severest of penalties, though
he has escaped all
the other consequences which men
call punishment (De
republica, iii, 22).

ca.533 A.D., Justinian: Natural
laws which are observed
among all nations are due to a

divine providence. They
remain in full force and are
immutable (pandects, I, 2).

ca. 1268, Henry de Bracton: The
King himself ought not
to be subject to any man, but he
ought to be subject to
God and the law, since law makes
the King. Therefore,
let the King render to the law
what the law has rendered
to the King, vis, dominion and
power, for there is no King
where will rules and not the law
(Tractatus de
legibus, f. 5b).

ca. 1275, St. Thomas Aquinas:
since all things subject to
Divine providence are ruled and
measured by the eternal
law...it is evident that all
things partake somewhat of
the eternal law, in so far as
...from its being imprinted
on them, they derive their respec-
tive inclinations to
their proper acts and ends. Now
among all others, the
rational creature is subject to
Divine providence in the
most excellent way, in so far as
it partakes of a share
of providence, by being provident
both for itself and
for others...This participation of
the eternal law in
the rational creature is called
the natural law...Every
human law has just so much of the
nature of law as it is
derived from the law of nature.
But if at any point it
deflects from the law of nature,

it is no longer a law but a perversion of law (Summa theologica, I, 2, Q. xci, art. 2; Q. xcv, art. 5).

ca.1593, Richard Hooker: This (natural) law we may name Eternal, being that order which God, before all ages, has set down with Himself to do all things by...The (natural) laws...do bind men absolutely even as they are men, although they have never any settled fellowship, nor any solemn agreement among themselves what to do or not to do...Human laws are measures in respect of men whose motions they must direct...Such measures have also their higher rules to be measured by: which rules are two, the law of God and the Law of Nature. So that laws must be made according to the general law of nature (Of the Laws of Ecclesiastical Polity, I, ii, 6; I, x, i; III, 9).

ca.1608, Edward Coke: The Law of Nature was before any judicial or municipal law and is immutable. The law of Nature is that which God at the time of the creation of nature of man infused into his heart for his preservation and direction; and this is the Eternal Law, the Moral Law, called also the Law of Nature (Calvin's Case, note 7, Rep. 12a).

ca.1612, Francis Suarez: The rational basis of the Law of Nations....consists in the fact that the human race, howsoever many the various peoples and kingdoms into which it may be divided, always preserves a certain unity, not only as a species, but also, as it were, a moral and political unity called for by the natural precept of mutual love and mercy, which applies to all... For just as in one state or province law is introduced by custom, so in the human race as a whole, it was possible for laws to be introduced by the habitual conduct of nations, and all the more because the matters comprised within this latter system of law are few and very closely related to the Natural Law, and most easily deduced therefrom in a manner so advantageous and so in harmony with nature itself, that while this derivation of the law of nations from Natural Law may not be self-evident, that is, not essentially and absolutely required for moral rectitude, it is nevertheless quite in accord with nature and universally acceptable for its own sake (De legibus ac de Deo legislatore, Vol. II, Chap. xix).

ca.1625, Hugo Grotius: The Natural Law is the dictate of right reason which points out that a given act, because of its

opposition to or conformity with man's rational nature, is either morally wrong or morally necessary, and accordingly forbidden or commanded by God, the Author of nature...Many human laws may be established supplementing the Natural Law, but they cannot contradict it (De jure belli et pacis, I,i,10).

ca. 1672, Samuel Pufendorf: We may call it (Natural Law) likewise the law Universal or Perpetual, the former, in regard that it binds the whole Body of the Human Race, the latter, because it is not subject to change (Of the Law of Nature and Nations, Oxford ed. (Oxford, 1703), p. 95).

C.a.1690, John Locke: Municipal laws are only so far right as they are founded on the law of Nature, by which they are to be regulated and interpreted (Second Treatise on Civil Government, chap. 2, sec. 12).

C.a.1758, Emmerich de Vattel: As men are subject to the laws of nature and as their union in civil society cannot exempt them from the obligation of observing those laws...the whole nation remains subject to the laws of nature and is bound to respect them in all its undertakings (Le droit des gens, Int. 5).

C.a.1765, William Blackstone: This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original (Commentaries on the Laws of England, Chitty ed. (New York, 1832), I, 27-28).

C.a.1776, Thomas Jefferson: When in the Course of human events, it becomes necessary for one people to dissolve the political bands, which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness (The Declaration of Independence, p. 1).

In enacting its RICO statute, the Indiana Legislature has utilized one of the states most basic and historic powers the "Natural Law" Legislative power possessed by state government which, in conjunction with the state's "natural law" administrative power equips the State of Indiana with the tools which are necessary to safeguard and maintain the moral environment of the local community against that type of public conduct which is malum in se. To deny the use of those tools, as a means to abate the continuing public exhibition for profit of the type of hard-core sexual conduct depicted in the Exhibits which Amicus Curiae has lodged with this court, would deprive the citizens of the State of Indiana of due process of law and equal protection under the law, and one of the fundamental rights essential to the concept of

well-ordered liberty; namely, the right to live in a community whose moral environment is free from the degrading and corrupting influences of the commercial exploitation of hard-core pornography.

This "Natural Law" right was recognized by Chief Justice Burger, writing for the majority in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973) at page 59:

> "In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to the passerby. Rights and interests' other than those of the advocates are involved.' Breard v. Alexandria, 341 U.S. 622, 642 (1951). These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable

correlation between obscene material and crime. Quite apart from sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickel:

> It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there...We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places--discreet, if you will, but accessible to all--with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not.' 22 The Public Interest 25, 25-26 (Winter, 1971). (Emphasis supplied.)"

As Chief Justice Warren stated there is a 'right of the Nation and of the States to maintain a decent society.....'Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)," (Footnotes omitted, our emphasis added.) See,

also, People ex rel. Busch et al. v. Projection Room Theater et al., 17 Cal. 3d 42 at 55:

> "Once a community through its public officials has determined that a particular display of obscene materials amounts to a public nuisance which is injurious to the safety and morals of that community, no valid reason exists why, adequate constitutional procedural safeguards being met, the remedy of civil abatement proceedings must be denied such community. The availability of the public nuisance procedure may prove useful for those local entities which, determining that they are confronted with commercial exploitation of obscene materials resulting in the conditions contemplated in section 370, elect to use it."

In addressing himself to the public morals issue and the pre-eminent "Natural Law" power of local government to control the same, Woods describes the danger to the environment as being in the nature of a "nuisance per se." See "The Law of Nuisances" by H.G. Wood, Section 23 and 24, at pages 45-46:

"Section 23. Acts affecting public morals, public nuisances per se, when-There are classes or kinds of businesses which are nuisances per se, and the very fact they they are carried on in a public place is prima facie sufficient to establish the offense. But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances per se, irrespective of their results and locations, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public decency."

"Section 24. Wrongs malum in se. The class of nuisances are of that aggravated class of wrongs that, being malum in se, the courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness

and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance." (Our emphasis.)

The municipal power to protect the environment is inherent in government itself and is so basic that its grant of authority is said to be "implied", and to flow from the Common Law rather than from "express" provisions in a City's Charter or the General Laws of the State. See "The Law of Nuisances", Wood, Section 743, at page 972:

"Section 743. No control over nuisances without special power. Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. There can be no question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance at common law or by statute, which is detrimental to the health of the inhabitants, it may be abated by the authorities, but it must be a nuisance at common law and one which any

person injured thereby might lawfully abate of his own motion, or in the absence of express or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance, and one which affects the health of the city, the abatement may be made by the authorities or by any persons injured thereby. The common law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated." (Our emphasis.)

Joyce, in his treatise "Law or Nuisance", Section 345, notes that this common law power entrusts a municipal corporation with not only the right but the obligation to remove the nuisance; at page 498:

"The rule is declared to be settled, without dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right, but is also under the obligation, to

remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is conclusive unless it transcends the power conferred by the charter or violates the constitution."

The importance of this municipal power was stressed by this Court in James Phalen v.The Commonwealth of Virginia, 12 L. Ed. 1030, 1033 (1850):

"The suppression of nuisances injurious to public health or morality is among the most important duties of government... It is a principle of the common law, that the king cannot sanction a nuisance..."

II

THE UNITED STATES SUPREME COURT HAS NEVER RULED UPON THE QUESTION WHETHER THE "UNLAWFUL BUSINESS OF OBSCENITY" CAN BE ABATED AS A PUBLIC NUISANCE, AND WHETHER THE STATE CAN DECLARE BY STATUTE THAT THE REAL ESTATE, UPON WHICH THE UNLAWFUL TRADE PRACTICE OF OBSCENITY IS ENGAGED, IS A PUBLIC NUISANCE WHICH MAY BE "REFORMED" AND "ABATED"

The United States Supreme Court has avoided a resolution of the

question whether the "unlawful business of obscenity", see People of the State of California v. E.W.A.P., Inc., 106 Cal App.3d 315 at 319, can be abated as a common law public nuisance; and whether a state statute is constitutional, which makes the real estate upon which obscenity is carried on as an unlawful trade practice, a public nuisance. This Petition for Writ of Certorari in Fort Wayne Books Inc., involving the Indiana RICO Statute, presents those collateral issues.

The principles which support public nuisance abatement and judicial reformation of the real estate are clearly stated in State of Idaho ex rel Kidwell v. U.S. Marketing, Inc., 102 Idaho 451, 25 ALR 4th 381, jur noted 454 US 1140, 71 L Ed 2d 291, 102 S CT 996 and app dismissed voluntarily by the appellant bookstore, U.S. Marketing, Inc., under Rule 53.2 (a) of

the Rules of the U.S. Supreme Court, and a miriad of other cases which have appeared on the docket of this court. See "Motion for Leave to File Brief Amicus Curiae" herein.

III

IN CONSTRUING THE CIVIL PROVISIONS OF THE INDIANA RICO STATUTE, THIS COURT MUST WEIGH IN THE BALANCE THE SERIOUS NATURE OF THIS NATION'S OBSCENITY PROBLEM, AS EXEMPLIFIED BY THE SIX EXHIBITS TO THIS BRIEF AMICUS CURIAE, WHICH HAVE BEEN FILED WITH THE CLERK OF THIS COURT.

As part of its argument in Roth vs. U.S. 354 U.S. 476 (1957), the United States Attorneys filed with the Clerk of the United States Supreme Court several examples of "hard-core pornography which the United States regularly encountered, as a background to the constitutional issues in Roth vs. U.S. Similarly, and for the same purposes, Amicus Curiae is concurrently filing the following six (6)

exhibits with the Clerk of this Court as a supplement to the program information on Satellite Station S-1 channel 18 and G-2 channel 10 presented at enclosures A and B to this Brief.

Exhibits:

1A, 1B. Two video tapes of the broadcast of S-1 channel 18 on March 12, 1988, including the Colleen Applegate film "SUZIE SUPERSTAR", as surveilled in Niagara County, New York.

2A, 2B. Two video tapes of the broadcast of S-1 Channel 18 on March 13, 1988, including the Colleen Applegate film "GLITTER"; as surveilled in Niagara County, New York.

3. A-C. Three volumes of time and motion studies of 29 copyrighted, hard-core pornographic films in which Colleen Applegate appeared.

4. Copyright search and copyrights for 29 hard-core pornographic films in which Colleen Applegate appeared.

5. A-G. Seven video tapes containing copies of 29 hard-core pornographic films in which Colleen Applegate appeared.

6. Video tape copy of PBS Documentary "DEATH OF A PORN QUEEN" reporting on the background and death of Colleen Applegate at age 20.

Amicus Curiae submit that, in view of the standing treaty obligations of this nation to proscribe obscenity, See Roth v U.S., supra, at footnote 15 on page 485, the failure of the office of the U.S. Attorney General to initiate a civil action to terminate the hard-core pornographic international satellite transmissions of Satellite Station S-1 channel 18 and G-2 channel 10, described at enclosures A and B to this Brief Amicus Curiae must be regarded as a potential national scandal. If the members of this Court agree with Amicus Curiae and deemed the autoptical evidence presented in Exhibits 1 thru 6 to be significant, then this Court should take judicial notice of such historical events and determine that the State of Indiana has the right to use the civil process of the law in the manner set forth by the Indiana State Legislature, and approved by a

majority of the justices of the Indiana Supreme Court as a means of controlling this problem.

This Court's opinion in Frisby et al v. Schultz and Braun__U.S.___(June 27, 1988) suggests a logical and appropriate manner of accomplishing the above.

Amicus Curiae believe that the law governing the issues in this case is clearly and adequately set forth in (1) the dissenting opinion of Mr. Justice Conover in the Court of Appeals of Indiana, Fourth District. (See Appendix to Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana at pages App. 80- App. 98); (2) the majority opinion of Chief Justice Givan in the Supreme Court of Indiana (See Appendix to Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana at pages App 1 - App 19); and (3) the recent opinion of Justice O'Connor (in which Rehnquist

Blackmun, Scalia, and Kennedy joined) in Frisby et al., vs Schultz and Braun ___ U.S.___ decided June 27, 1988. The Frisby case upheld the Wisconsin ordinance as not facially invalid under the First Amendment, by construing the ban to be a limited one. In this case, moving parties believe that the civil aspect of the Indiana RICO statute can and should be upheld by a narrowing construction which directs the aim of the statute at the "unlawful business" of obscenity which, at common law, was a well-recognized public nuisance, and at "hard-core" pornography which, under U.S. vs. 37 Photographs, 402 U.S. 363 at 377 is "contraband" under federal law. See, also, the extended discussion of hard-core pornography by Mr. Justice Tobriner in Zeitlin vs.Arnebergh 59 Cal 2d 901, 31 Cal. Rptr. 800 (1963)

Further, as did occur in the arguments in Roth vs. U.S. 354 U.S. 476 (1957), moving parties believe that the focus of this court and its membership should be directed at the very real and serious nature of the "hard-core pornography" which presently confronts this nation. Moving parties Clancy and Phil and Karen Applegate, parents of Colleen Applegate, also known as "SHAUNA GRANT" have done so by filing with this court a copy of the PBS video educational documentary "Death of a Porn Queen", and time and motion studies and video tape copies of the 29 hard-core pornographic films which were made of their daughter, Colleen Applegate, and time and motion studies and videotape copies of her films ""SUZY SUPERSTAR" and "GLITTER") as recorded from surveillance of the S-2 channel 18 transmissions on March 12, 1988 and March 13, 1988. See A 26 and A

27, infra) Videotape copies of Colleeen Applegate's 29 films are being sold in neighborhood video stores throughout this nation without any resistance by federal law enforcement, which believes that this court has given its endorsement to such products.

Moving parties believe that if the Indiana Civil RICO statute is upheld by this court, such will make it possible to end the trade in such unlawful hard-core pornographic films, because this court's action will send a signal to federal law enforcement that their present evaluation is INACCURATE.

CONCLUSION

The judgment of the Indiana Supreme Court should be affirmed for all of the reasons stated above.

July 7, 1988 Respectfully Submitted

JAMES J. CLANCY

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I, hereby certify that on this 7th day of July 1988, the original and 40 copies of the within Amicus Curiae Brief (less exhibits 1-6) were deposited in the United States Post Office in Van Nuys, California with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

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ENCLOSURE A

PROGRAM OF HARD-CORE PORNOGRAPHIC MOTION PICTURE FILMS EXHIBITED NATION-WIDE BY HOME DISH ONLY SATELLITE NETWORKS, INC., A NEW YORK CORPORATION, ON ITS AMERICAN EXXXTASY CHANNEL SERVICE ON SATELLITE STATION S-1 CHANNEL 18, DURING THE PERIOD FROM SEPTEMBER 1, 1987 THROUGH SEPTEMBER 31, 1988.

(Reference: Amicus Curiae Brief at pages 5, 14, 16, 17, 40, 41, 44-45)

SPACENET 1,
CHANNEL 18

VIDEOCIPHER® II
DESCRAMBLER

Wild Weekends

HALLOWEEN SPECIAL

Spend October 31 with the ***Devil and Miss Jones***—all four movies! From Gerard Damiano's original groundbreaking film, we go to Henri Pachard's riotous remake, still starring Georgina Spelvin, the super hot lady that made Miss Jones in famous. ***Devil In Miss Jones, Parts 3 and 4,*** are directed and produced by the Dark Brothers. Some of their movies that've played on American Exxxtasy are ***Deep Inside Vanessa Del Rio*** and ***New Wave Hookers.*** Starring Lois Ayres, and a cast of wild characters, your Halloween night will be filled with devilish fun!

SUPERGIRL WEEKEND

Two nights starring some of the hottest ladies in the sexiest movies available! Starting at 10 pm (ET) on November 27 there's the premiere of ***Supergirls Do General Hospital, Ecstasy Girls, Garage Girls*** and ***Trinity Brown.*** Saturday November 28, its the premiere of ***Supergirls Do The Navy,*** followed by ***Ecstasy Girls 2, Working Girls*** and the premiere of ***Good Girl, Bad Girl.*** You'll be spending your weekend with superstars Colleen Brennan, Sharron Mitchel, Raven, Taija Rae, Ginger Lynn, Paul Thomas, Jerry Butler, John Leslie and Jamie Gillis. And a hot time will be had by all!

CHRISTMAS WISH WEEKEND

Spend Christmas in fantasyland with the American Exxxtasy premieres of ***Every Woman Has A Fantasy, Parts 1 and 2,*** leading off the evenings of Dec. 25 and 26th. The original stars Rachel Ashley and John Leslie as a married couple who tell each other the fantasies of their friends. It's one of the best comedy couples films ever made. John Leslie in drag is not to be missed! ***Part 2*** also stars John Leslie, Lois Ayres and Nina Hartley as the fantasy fun continues intensely. Also playing on the 25th and 26th is the sensationally sensuous ***The Passion Within, Blame It On Ginger, Trashy Lady, Pussycat Galore*** and ***Working Girls.*** American Exxxtasy helps make your Christmas wishes come true!

AMERICAN EXXXTASY

Movie Highlights

*PREMIERE MOVIES

A

AMANDA BY NIGHT (1980) Intricate detective drama of the mob, pimps, a high class prostitution ring, and murder. Starring Veronica Hart, R. Bolla. Sept. 8, 19, 28; Nov. 1; Dec. 1.

B

BALL BUSTERS (1983) Eight California cuties know just what they want and go after it with gusto. Starring Gina Carrera, Jamie Gillis. Sept. 3, 13, 29; Oct. 15, 26; Nov. 11, 30; Dec. 13, 28.

BLAME IT ON GINGER (1986) Co-starring Jamie Gillis, this very modern story chronicles the sexual tribulations of four couples as they seek to better their sex lives. A pertinent story with social implications. Directed by Henri Pachard. Sept. 6, 30; Oct 12; Dec. 2, 14, 25.

C

CAREFUL, HE MAY BE WATCHING (1986) The platinum Princes of Porn, Seka, stars as a housewife who leads a double life as a super-star X-rated actress, making her films while her husband's out of town. Starring Seka, Mike Horner. Sept. 13; Oct. 1, 13, 24; Nov. 10, 22; Dec. 15, 27.

CLUB GINGER (1986) Ginger reads her fan mail, acting out the writers' fantasies. Starring Ginger Lynn. Sept. 16, 28; Oct. 21; Nov. 8, 19.

***CORPORATE ASSETS** (1985) A riveting drama of women "kept" by a conglomerate to entertain politicians, power brokers and the executives themselves. One woman fights to free herself from the psychological and physical enslavement, aided by her former lover, a Vietnam veteran. Truly top notch acting and sex, and even a "Rambo" style ending. Starring Tish Ambrose, Sherri St. Claire, Eric Edwards, Richard Bolla. Oct. 2, 17, 30; Nov. 8, 19, 30.

D

***DEVIL IN MISS JONES** (1972) Director Gerard Damiano's classic drama of a virgin spinster, horrified at her sexual compulsions, who commits suicide. In Hell, the devil grants her a reprieve so she can return to earth to experience all the sex and lust she missed. Starring Georgina Spelvin, Harry Reems. Oct. 31; Dec. 6, 31.

***DEVIL IN MISS JONES, PART 2** (1983) Director Henri Pachard continues the story of Justine Jones as a wacky comedy. Justine's been in Hell all these years and the Devil's fallen in love with her. She wants to go back to earth for a while, but the Devil won't part with her. So he lets her soul go and inhabit other women's bodies, with outrageous results. Starring Georgina Spelvin, Jack Wrangler, Ron Jeremy, Sharron Mitchell, Samantha Fox. Oct. 31, Dec. 7, 31.

***DEVIL IN MISS JONES, 3: THE NEW BEGINNING** (1986) The Dark Brothers give us a new Justine (Lois Ayres) and a vision of Hell from your worst nightmares. The occupants of Hell are forever doomed to be sexually frustrated by whatever their sins were in life. Justine is guided through the horrors by a jive-talking black man named Negro who's constant patter ranges from filthy to hysterically perverse. You have never seen anything like this film. Winner of the Critic's Award for Best Picture. Starring Lois Ayres, Jack Baker, Vanessa Del Rio, Amber Lynn. Oct. 31; Dec. 8, 31.

***DEVIL IN MISS JONES, 4: THE FINAL OUTRAGE** (1986) The Dark Brothers continue Justine's tour of Hell, and if you thought part 3 was bizarre and sexually intense, fasten your seat belts! The truly depraved descent is about to begin! Starring Lois Ayres, Jack Baker. Oct. 31, Dec. 31.

***DREAMGIRLS** (1986) A sweet, funny and highly erotic tribute to all the girls a man fantasizes about but never has—his high school teacher, a metermaid, a centerfold, etc. Starring Jamie Gillis, Taija Rae, Amber Lynn. Oct. 3; Nov. 12, 22.

E

ECSTASY GIRLS (1979) Five women are photographed in various unusual poses to prove to their father they're immoral. Starring Desiree Cousteau, Jamie Gillis. Sept. 23; Nov. 3, 27; Dec. 8.

ECSTASY GIRLS, PART 2 (1986) The search for a man's illegitimate daughter leads a private eye through high society, bordellos, and Mob-owned strip joints in modern-day Los Angeles. Starring Joanna Storm, Jamie Gillis, John Leslie, Heather Wayne. Sept. 24; Nov. 4, 28; Dec. 9.

***EVERY WOMAN HAS A FANTASY** (1984) This high class comedy tells the tale of Ben and Terry, a couple whose lives are enriched by the fantasies exchanged at Terry's weekly women's group. Ben, fascinated by the stories, contrives different ways to first eavesdrop, then visit, the group of ladies. Starring John Leslie, Rachel Ashley. Dec. 25.

***EVERY WOMAN HAS A FANTASY, 2** (1986) The fantasies and comedy continue in this perfect couples' film, as one woman after another reveals her innermost desires. Starring John Leslie, Nina Hatley, Lois Ayres. Dec. 26.

EXTREMES (1981) A panorama of sexual extremes from San Francisco to Hamburg. Starring Jamie Gillis, Serena. Sept. 6, 15, 27; Nov. 13.

F

***FLESH AND FANTASY** (1985) A guardian angel helps an unlucky guy with his girl problems. Starring Taija Rae, Ron Jeremy, Sharon Kane. Nov. 14, 20, 29; Dec. 10, 22.

***FORBIDDEN BODIES** (1986) A series of short stories set in the 50s burlesque era, told by a bar bum mooching drinks ... Sexy, sentimental, funny and a great blues/jazz score. Directed by Gerard Damiano. Starring Tom Byron, Jeanette Littledove, Candie Evens, Krista Lane. Oct. 10, 23; Nov. 5, 17, 29; Dec. 15, 30.

***FOR RICHER, FOR POORER** (1979) After many years of marriage a wife is abandoned by her husband for a younger woman. She reflects back on their life together, and slowly starts making a new life for herself. Starring Georgina Spelvin, Richard Bolla. Nov. 7, 20, 30; Dec. 13, 24.

Movie Highlights

G

GENTLEMEN PREFER GINGER (1986) A lady collects husbands who travel a lot, juggling them until one returns unexpectedly. Starring Ginger Lynn. Oct. 1, 16, 28; Nov. 9, 25; Dec. 8, 20.

GETTING PERSONAL (1985) A former call girl reminisces about her past experiences. Starring Colleen Brennan, Herschel Savage. Sept. 1, 13, 25; Oct. 10, 18; Nov. 6, 16, 29; Dec. 11, 24.

***GOOD GIRL, BAD GIRL** (1984) Famous superstar Velva is killed and the detective assigned to the case become obsessed with her life as he searches for her killer. Starring Colleen Brennan, Joey Silvera, Sharron Mitchell, Jerry Butler. Nov. 28; Dec. 30.

GREAT SEXPECTATIONS (1983) A porno director's life on the set and off. Starring R. Bolla, Sharon Kane. Sept. 9, 20; Oct. 6, 19; Nov. 3, 15, 26.

H

***HARLEM CANDY** (1987) A big-shot white candy manufacturer schemes to discover the secret of a poor, black candymaker's special chocolates in this amusing, interracial comedy. Starring Herschel Savage, Krista Lane. Sept. 12, 26; Oct. 8, 19, 30; Nov. 10; Dec. 6, 17.

I

IF MY MOTHER ONLY KNEW (1986) A girl tries to hide her affair with her boyfriend, not knowing her very own mother is having a wild affair with the same boy. Starring Amber Lynn. Sept. 4, 16; Oct. 9, 18, 29; Nov. 10; Dec. 3, 15, 27.

L

LIQUID ASSETS (1982) An intricately plotted tax scam goes completely haywire when the concerned parties discover who's been sleeping with whom and for what greedy reasons. Starring Tiffany Clark, Bobby Astyr. Sept. 4, 27; Oct. 2, 12; Nov. 1.

LILITH UNLEASHED (1985) Lucifer and Lilith are reunited in the 20th Century when she escapes a mental asylum and wreaks sexual havoc on an entire community. The sex, acting and special effects and a very funny script all add up to a great time. Starring Tish Ambrose, Paul Thomas, Tasha Voux, Ron Jeremy. Sept. 9, 22; Oct. 3, 14, 30; Nov. 13, 25.

LUST ON THE ORIENT EXPRESS (1986) A man and wife mystery-writer team board the famous train to Istanbul, becoming embroiled in more murder and mayhem than they could've imagined in this lavishly produced comedy. Starring John Leslie, Gina Carrera. Sept. 1, 18; Oct. 5, 22; Nov. 13, 22; Dec. 4, 17, 29.

M

MIDNIGHT HEAT (1983) A hit man takes on more than he can handle in this psychological thriller. Starring Jamie Gillis, Tish Ambrose. Sept. 17; Oct. 4, 14; Nov. 10, 22; Dec. 28.

***MOUTHWATERING** (1986) A plump young gal slims down at a gym. The result is a sleek and sexy cutie who romps with all the boys, though her lover is less than pleased about it. Starring Tiaja Rae, Herschel Savage, Tracy Adams, Paul Thomas. Dec. 4, 12, 25.

N

NAKED SCENTS (1985) The ins and outs and ups and downs of launching a powerful new perfume. Starring Tish Ambrose. Sept. 24; Oct. 10, 22; Nov. 6, 18; Dec. 5, 18, 27.

NOTHING TO HIDE (1984) A sensitive young man finds true love in spite of his macho friend's advice, in this award-winning comedy/drama. One of the top ten erotic films ever made. Starring John Leslie, Richard Pacheco, Chelsea Manchester. Sept. 2, 14, 25; Oct. 23; Dec. 7.

O

THE ODDEST COUPLE (1986) A prim and proper young lady takes in a wild nympho as a roommate with hilariously arousing results. Starring Siobhan Hunter, Danielle, Paul Thomas. Sept. 14, 30; Oct. 11, 26.

***1001 EROTIC NIGHTS, PART 1** (1980) A beautiful sex "guru" leads an unhappy man to sexual fulfillment and enlightenment. Starring Annette Haven, Richard Pacheco. Sept. 18, 29; Oct. 7, 25; Nov. 17; Dec. 2, 20.

***1001 EROTIC NIGHTS, PART 2** (1986) A sultan searches for the ultimate in sexual entertainment. Starring Jamie Gillis, Kelli Richards, Nina Hartley. Sept. 18, 30; Oct. 8, 26; Nov. 18; Dec. 3, 21.

P

PASSAGE THRU PAMELA (1985) A South American beauty becomes a famous fashion model, but her secret almost destroys both her and the top agency she works for. Starring Pamela, Sharon Kane, Joey Silvera. Sept. 10, 20; Oct. 7, 25; Nov. 9; Dec. 9.

***THE PASSION WITHIN** (1986) A tender and believable romantic drama of a young divorcee searching for a sensitive man to fall in love with. She finds him, but all is not what it seems. Starring Nina Hartley, John Leslie. Oct. 3, 16, 29; Nov. 16, 26; Dec. 13, 25.

PROJECT: GINGER (1986) A scientist creates the perfect woman. Starring Ginger Lynn, Tom Byron. Sept. 2; Nov. 2; Dec. 4.

***PUSSYCAT GALORE** (1984) Pussycat Galore Girls is an elite escort service, and watching them "in training" is half the fun. The other half is the good script, nice locations and some sexy acting." Starring Danielle, Joey Silvera, Brooke Fields, Chelsea Blake, Jerry Butler. Dec. 5, 18, 26.

R

RIBALD TALES OF CANTERBURY (1985) A lavish costume epic set in Merry Old England from Palace bedrooms to serfs' cottages. Starring Hyapatia Lee, Colleen Brennan. Sept. 17; Oct. 5, 21; Nov. 3, 14; Dec. 3, 15.

S

***SATISFIERS OF ALPHA BLUE** (1981) At a sex resort of the future, both male and female "satisfiers" work to please their guests, one of whom longs for the days of old-fashioned love. Starring Richard Bolla, Lysa Thatcher. Dec. 12, 18.

***SEX ASYLUM 2** (1987) Join the patients, nurses and doctors for a wild romp through a hospital for the sexually insane. Starring Jamie Gillis, Amber Lynn. Sept. 19, 25; Oct. 6, 17, 27; Nov. 18; Dec. 24.

***SOUNDS OF SEX** (1985) Mrs. Honneycut likes to make recordings of her varied sex life. She also eavesdrops on others

Movie Highlights

with sophisticated electronic equipment, a habit which leads to definite complications. Starring Tom Byron, Cara Lott, Marc Wallace, Karen Summer. Nov. 13, 21; Dec. 12, 22.

***SUPERGIRLS DO GENERAL HOSPITAL** (1984) A glamorous movie star is admitted to General Hospital and the doctors go to wild lengths to keep her there as long as possible in an effort to get publicity for the hospital. Clever and quite funny. Starring Taija Rae, Raven, Paul Thomas, Joey Silvera, Ginger Lynn. Nov. 27; Dec. 12, 27.

***SUPERGIRLS DO THE NAVY** (1984) Three college girls are easily distracted from their studies by the sexual escapades of their neighbor. In an effort to prevent flunking out, they do extra credit work aboard a submarine, causing much fun and havoc. Starring Raven, Paul Thomas, Taija Rae, Susan Nero. Nov. 28; Dec. 16, 28.

T

TABOO AMERICAN STYLE (PARTS 1 & 2) (1986) A shocking tale of a ruthless young woman's domination and manipulation of her entire family through incest, drugs, and her almost demonic powers of sexual persuasion. I: Sept. 7; Oct. 6; Nov. 23; Sept. 8; Oct. 13; Nov. 24; Dec. 21.

TABOO AMERICAN STYLE (PARTS 3 & 4) (1986) The saga continues as Raven manipulates her family at home while pursuing her dreams of becoming a movie star while ruthlessly seducing and destroying anyone who stands in her way. III: Sept. 9; Oct. 20; Nov. 25; Dec. 22. IV: Sept. 10; Oct. 27; Nov. 26; Dec. 23.

THAT'S OUTRAGEOUS! (1983) A fashion photographer leads a double life, in love with two Parisian ladies who turn out to be sisters. Shot on location in Paris, this flick's a natural for couples. Starring Jamie Gillis, Frannie Lomay, Joey Silvera, Natasha. Dec. 11, 19.

***THROAT: 12 YEARS AFTER** (1984) Couples re-examine their sexual relations, emotions and changing sexual and social mores. Starring Joanna Storm, Eric Edwards, Jerry Butler, Sharron Kane. Dec. 4, 19.

TASTY (1986) The WKRP takeoff has a failing radio station turn to sex talk shows to raise its ratings. Starring Hyapatia Lee. Sept. 2; Oct. 18; Nov. 5, 16; Dec. 10, 21.

TICKLED PINK (1985) A couple looking to sell their house are visited by a couple who thinks they're going to a swing party in this hilarious comedy of errors. Starring Sharon Kane, Joey Silvera. Sept. 4, 15, 26; Oct. 15, 25.

***TOO HOT TO TOUCH** (1985) Outrageous hijinks of a competition ski team on and off the slopes. Starring Angel, Kay Parker, Jamie Gillis. Oct. 9, 24; Nov. 7; Dec. 7, 22.

***TOWER OF POWER** (1985) The wheelings and dealings and sexual shenanigans behind the scenes of a major corporations. Starring Angel, Harry Reems, Annette Haven, John Leslie. Oct. 2, 17, 30; Nov. 17; Dec. 19.

***TRASHY LADY** (1985) An innocent country girl comes to the big city and catches the eye of a big time gangster. He trains her to be a "proper" moll in this lavish production set in the 1930s. Starring Ginger Lynn, Harry Reems, Amber Lynn, Tom Byron. Oct. 16, 24; Nov. 9, 19, 29; Dec. 14, 26.

***TRINITY BROWN** (1984) First rate movie of a male/female cop team investigating a Mafia figure's murder. Great action, well produced—a real winner. Starring Colleen Brennan, John Leslie, Kimberly Carson, Jamie Gillis. Nov. 21, 27; Dec. 6, 19, 30.

U

***ULTIMATE LOVER** (1986) Two female scientists, disappointed with the men in their lives, create the "perfect" man—a sex machine that doesn't stop. The monster becomes uncontrollable until he's programmed with human emotions. A very funny and touching comedy. Starring Nina Hartley, Eric Edwards, Amber Lynn. Dec. 5, 11, 21.

V

***V—THE HOT ONE** (19879) V. for Valerie, is a schizophrenic who swings between being wildly wanton and virginally prude. Starring Annette Haven, John Leslie, Paul Thomas. Sept. 4, 12, 25; Oct. 11, 24; Nov. 11, 24; Dec. 14, 30.

W

***WILD THINGS II** (1986) Five vignettes celebratmg sexually liberated ladies. Starring Joanna Storm, John Leslie. Sept. 8, 21; Oct. 5, 15, 28; Nov. 8; Dec. 2, 29.

***WORKING GIRLS** (1985) A well-written and very spicy series of sketches about prostitutes, with each segment done by a different director, and featuring a different set of stars. Starring Sherri St. Claire, Ron Jeremy, Ali Moore, Mike Horner. Sept. 11, 19; Oct. 2, 12, 21, 29; Nov. 28; Dec. 1, 12, 26.

WORLD ACCORDING TO GINGER (1986) Ginger travels through time through hypnosis to find her true, ultimate lover. A lush, atmospheric tale of romance that deals with the concept of reincarnation. Co-starring Amber Lynn, Randy West. Sept. 26; Oct. 11, 22; Nov. 16.

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SEPTEMBER

SUBSCRIPTION

		10 PM (ET)	11:30 PM
	TUE 1	SKIN ON SKIN	LUST ON THE ORIENT EXPRESS
	WED 2	PROJECT: GINGER	NAUGHTY VICTORIANS
	THUR 3	S'MASHED	SENSATIONS
	FRI 4	*V—THE HOT ONE	TICKLED PINK
BACK TO SCHOOL	SAT 5	CO-ED FEVER	DESIRES WITHIN YOUNG GIRLS
	SUN 6	BLAME IT ON GINGER	EXTREMES
	MON 7	TABOO AMERICAN STYLE I	WET DREAMS
	TUE 8	BUTTERFLIES	TABOO AMERICAN STYLE II
	WED 9	PLAYGIRL	GREAT SEXPECTATIONS
	THUR 10	PANDORA'S MIRROR	CLIMAX!
	FRI 11	*WORKING GIRLS	ERUPTION
	SAT 12	*HARLEM CANDY	THE OTHER SIDE OF JULIE
	SUN 13	CAREFUL. HE MAY BE WATCHING	GETTING PERSONAL
	MON 14	PEEPING TOM	NOTHING TO HIDE
	TUE 15	NAUGHTY VICTORIANS	EXTREMES
	WED 16	IF MY MOTHER ONLY KNEW	CLUB GINGER
	THUR 17	MASCARA	RIBALD TALES OF CANTERBURY
FLYING CARPET FRIDAY	FRI 18	*1001 EROTIC NIGHTS I	*1001 EROTIC NIGHTS II
	SAT 19	*SEX ASYLUM II	AMANDA BY NIGHT
	SUN 20	GARAGE GIRLS	GREAT SEXPECTATIONS
	MON 21	HEART THROBS	WILD THINGS II
	TUE 22	LILITH UNLEASHED	AUNT PEG'S FULFILLMENT
	WED 23	ECSTASY GIRLS I	SEXCAPADES
	THUR 24	ECSTASY GIRLS II	OTHER SIDE OF JULIE
	FRI 25	*V—THE HOT ONE	GETTING PERSONAL
	SAT 26	*HARLEM CANDY	TICKLED PINK
	SUN 27	EXTREMES	LIQUID ASSETS
	MON 28	CLUB GINGER	SENSATIONS
	TUE 29	*1001 EROTIC NIGHTS I	BALL BUSTERS
	WED 30	*1001 EROTIC NIGHTS II	ODDEST COUPLE

SERVICE (XXX)

1 AM	2:30 AM	4 AM
GETTING PERSONAL	PUSS 'N BOOTS	SKIN ON SKIN
NOTHING TO HIDE	TASTY	PROJECT: GINGER
FASCINATION	CLUB GINGER	S'MASHED
IF MY MOTHER ONLY KNEW	LIQUID ASSETS	*V—THE HOT ONE
PRIVATE SCHOOL GIRLS	GOOD GIRLS OF GODIVA HIGH	CO-ED FEVER
MASCARA	AUNT PEG	BLAME IT ON GINGER
RIBALD TALES OF CANTERBURY	GARAGE GIRLS	TABOO AMERICAN STYLE I
WILD THINGS II	AMANDA BY NIGHT	BUTTERFLIES
TABOO AMERICAN STYLE III	LILITH UNLEASHED	PLAYGIRL
PASSAGE THRU PAMELA	TABOO AMERICAN STYLE IV	PANDORA'S MIRROR
HEART THROBS	CAN'T GET ENOUGH	*WORKING GIRLS
SKIN ON SKIN	*V—THE HOT ONE	*HARLEM CANDY
BALL BUSTERS	SENSATIONS	CAREFUL. HE MAY BE WATCHING
ODDEST COUPLE	PROJECT: GINGER	PEEPING TOM
S'MASHED	TICKLED PINK	NAUGHTY VICTORIANS
FASCINATION	DESIRES WITHIN YOUNG GIRLS	IF MY MOTHER ONLY KNEW
PRIVATE SCHOOL GIRLS	MIDNIGHT HEAT	MASCARA
LUST ON THE ORIENT EXPRESS	NAUGHTY VICTORIANS	*1001 EROTIC NIGHTS I
STIMULATORS	*WORKING GIRLS	*SEX ASYLUM II
BUTTERFLIES	PASSAGE THRU PAMELA	GARAGE GIRLS
ANGIE: UNDERCOVER COP	PLAYGIRL	HEART THROBS
ERUPTION	PANDORA'S MIRROR	LILITH UNLEASHED
CO-ED FEVER	CLIMAX!	ECSTASY GIRLS I
BEVERLY HILLS COX	NAKED SCENTS	ECSTASY GIRLS II
NOTHING TO HIDE	*SEX ASYLUM II	*V—THE HOT ONE
PEEPING TOM	WORLD ACCORDING TO GINGER	*HARLEM CANDY
NAUGHTY VICTORIANS	IF MY MOTHER ONLY KNEW	EXTREMES
AMANDA BY NIGHT	FASCINATION	CLUB GINGER
PROJECT: GINGER	CAN'T GET ENOUGH	*1001 EROTIC NIGHTS I
S'MASHED	BLAME IT ON GINGER	*1001 EROTIC NIGHTS II

*PREMIERE MOVIES

#408—INVISIBRIEFS
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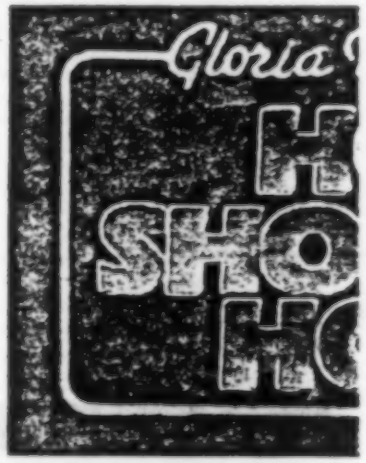
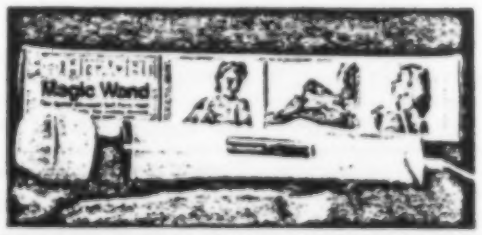


FRIDAYS AND SATI



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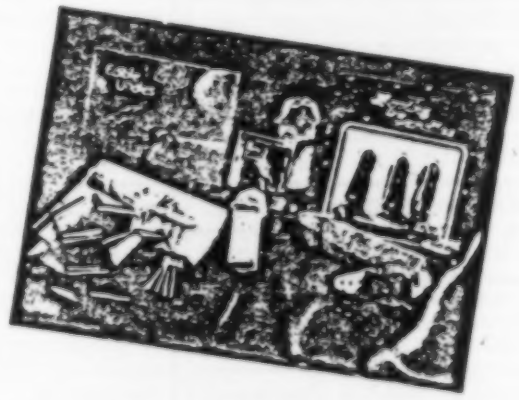
#207 MEN'S GRAB BAG—
—10 novelty items including edible panties, "boob" pacifier, wind-up pussy, nude playing cards, etc. Perfect for bachelor parties. **$30**



#105 WOMEN'S GRAB BAG—9
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#116 DEEP THROAT II & PLEASURE ISLAND
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#214 WEEKEND ORGY KIT
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ONLY $50

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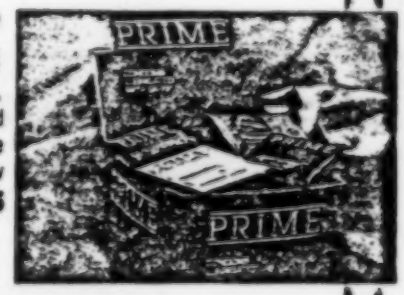

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OCTOBER

SUBSCRIPTION

		10 PM (ET)	11:30 PM
YUPPIE NIGHT	THUR 1	CAREFUL: HE MAY BE WATCHING	GENTLEMEN PREFER GINGER
	FRI 2	*CORPORATE ASSETS	WORKING GIRLS
	SAT 3	*DREAM GIRLS	LILITH UNLEASHED
	SUN 4	STIMULATORS	UP, UP AND AWAY
	MON 5	WILD THINGS II	BUTTERFLIES
	TUE 6	GREAT SEXPECTATIONS	SEX ASYLUM II
	WED 7	GINGER EFFECT	1001 EROTIC NIGHTS I
	THUR 8	HARLEM CANDY	1001 EROTIC NIGHTS II
	FRI 9	*TOO HOT TO TOUCH	IF MY MOTHER ONLY KNEW
	SAT 10	*FORBIDDEN BODIES	GETTING PERSONAL
	SUN 11	WORLD ACCORDING TO GINGER	ODDEST COUPLE
	MON 12	WORKING GIRLS	LIQUID ASSETS
	TUE 13	ANGIE: UNDERCOVER COP	CO-ED FEVER
	WED 14	LILITH UNLEASHED	MIDNIGHT HEAT
	THUR 15	BALL BUSTERS	TICKLED PINK
	FRI 16	*TRASHY LADY	STIMULATORS
	SAT 17	*TOWER OF POWER	AUNT PEG
	SUN 18	IF MY MOTHER ONLY KNEW	AUNT PEG'S FULFILLMENT
	MON 19	CLIMAX!	HARLEM CANDY
	TUE 20	PANDORA'S MIRROR	BUTTERFLIES
	WED 21	RIBALD TALES OF CANTERBURY	ERUPTION
	THUR 22	NAKED SCENTS	LUST ON THE ORIENT EXPRESS
	FRI 23	*FORBIDDEN BODIES	GARAGE GIRLS
	SAT 24	*TRASHY LADY	V—THE HOT ONE
	SUN 25	BEVERLY HILLS COX	PASSAGE THRU PAMELA
	MON 26	ODDEST COUPLE	1001 EROTIC NIGHTS II
	TUE 27	UP, UP AND AWAY	SEX ASYLUM II
	WED 28	GENTLEMEN PREFER GINGER	WILD THINGS II
	THUR 29	*THE PASSION WITHIN	WORKING GIRLS
	FRI 30	*CORPORATE ASSETS	HARLEM CANDY
HALLOWEEN SPECIAL	FRI 31	*DEVIL IN MISS JONES I	*DEVIL IN MISS JONES II

SERVICE (XXX)

1 AM	2:30 AM	4 AM
ANGIE: UNDERCOVER COP	SEXCAPADES	CAREFUL, HE MAY BE WATCHING
LIQUID ASSETS	*TOWER OF POWER	*CORPORATE ASSETS
HARLEM CANDY	*THE PASSION WITHIN	DREAM GIRLS
MIDNIGHT HEAT	AUNT PEG	STIMULATORS
LUST ON THE ORIENT EXPRESS	RIBALD TALES OF CANTERBURY	WILD THINGS II
TABOO AMERICAN STYLE I	LAURA'S DESIRES	GREAT SEXPECTATIONS
PASSAGE THRU PAMELA	GARAGE GIRLS	GINGER EFFECT
AUNT PEG'S FULFILLMENT	PANDORA'S MIRROR	HARLEM CANDY
ERUPTION	PEEPING TOM	*TOO HOT TO TOUCH
NAKED SCENTS	PLAYGIRL	*FORBIDDEN BODIES
CAN'T GET ENOUGH	V—THE HOT ONE	WORLD ACCORDING TO GINGER
SEXCAPADES	BLAME IT ON GINGER	WORKING GIRLS
TABOO AMERICAN STYLE II	CAREFUL, HE MAY BE WATCHING	ANGIE: UNDERCOVER COP
PRIVATE SCHOOL GIRLS	BEVERLY HILLS COX	LILITH UNLEASHED
UP, UP AND AWAY	WILD THINGS II	BALL BUSTERS
GENTLEMEN PREFER GINGER	*THE PASSION WITHIN	*TRASHY LADY
SEX ASYLUM II	*CORPORATE ASSETS	*TOWER OF POWER
GETTING PERSONAL	TASTY	IF MY MOTHER ONLY KNEW
FASCINATION	GREAT SEXPECTATIONS	CLIMAX!
TABOO AMERICAN STYLE III	MASCARA	PANDORA'S MIRROR
CLUB GINGER	WORKING GIRLS	RIBALD TALES OF CANTERBURY
WORLD ACCORDING TO GINGER	AMANDA BY NIGHT	NAKED SCENTS
MIDNIGHT HEAT	NOTHING TO HIDE	*FORBIDDEN BODIES
CAREFUL, HE MAY BE WATCHING	*TOO HOT TO TOUCH	*TRASHY LADY
1001 EROTIC NIGHTS I	TICKLED PINK	BEVERLY HILLS COX
BALL BUSTERS	DESIRES WITHIN YOUNG GIRLS	ODDEST COUPLE
TABOO AMERICAN STYLE IV	SEXCAPADES	UP, UP AND AWAY
AUNT PEG	CAN'T GET ENOUGH	GENTLEMEN PREFER GINGER
IF MY MOTHER ONLY KNEW	STIMULATORS	*THE PASSION WITHIN
LILITH UNLEASHED	*TOWER OF POWER	*CORPORATE ASSETS
DEVIL IN MISS JONES III	*DEVIL IN MISS JONES IV	*DEVIL IN MISS JONES I

*PREMIERE MOVIES

NOVEMBER

SUBSCRIPTION

	10 PM (ET)	11:30 PM
SUN 1	CO-ED FEVER	AMANDA BY NIGHT
MON 2	LAURA'S DESIRES	FASCINATION
TUE 3	GREAT SEXPECTATIONS	RIBALD TALES OF CANTERBURY
WED 4	GARAGE GIRLS	SEXCAPADES
THUR 5	TASTY	FORBIDDEN BODIES
FRI 6	*TRINITY BROWN	ERUPTION
SAT 7	*FOR RICHER, FOR POORER	CAN'T GET ENOUGH
SUN 8	CLUB GINGER	STIMULATORS
MON 9	PASSAGE THRU PAMELA	TRASHY LADY
TUE 10	MIDNIGHT HEAT	IF MY MOTHER ONLY KNEW
WED 11	BALL BUSTERS	SENSATIONS
THUR 12	DREAM GIRLS	BEVERLY HILLS COX
FRI 13	*SOUNDS OF SEX	LUST ON THE ORIENT EXPRESS
SAT 14	*FLESH & FANTASY	PEEPING TOM
SUN 15	BUTTERFLIES	PANDORA'S MIRROR
MON 16	WORLD ACCORDING TO GINGER	GETTING PERSONAL
TUE 17	TOWER OF POWER	1001 EROTIC NIGHTS I
WED 18	SEX ASYLUM II	1001 EROTIC NIGHTS II
THUR 19	TRASHY LADY	CORPORATE ASSETS
FRI 20	*FOR RICHER FOR POORER	CLIMAX!
SAT 21	*TRINITY BROWN	MASCARA
SUN 22	CAREFUL, HE MAY BE WATCHING	MIDNIGHT HEAT
MON 23	UP, UP AND AWAY	CO-ED FEVER
TUE 24	V—THE HOT ONE	BEVERLY HILLS COX
WED 25	GENTLEMEN PREFER GINGER	LILITH UNLEASHED
THANKSGIVING THUR 26	SENSATIONS	GREAT SEXPECTATIONS
SUPERGIRL WEEKEND FRI 27	*SUPERGIRLS DO GENERAL HOSPITAL	ECSTASY GIRLS I
SAT 28	*SUPERGIRLS DO THE NAVY	ECSTASY GIRLS II
SUN 29	GETTING PERSONAL	FORBIDDEN BODIES
MON 30	*FOR RICHER, FOR POORER	CORPORATE ASSETS

SERVICE (XXX)

1 AM	2:30 AM	4 AM
SENSATIONS	LIQUID ASSETS	CO-ED FEVER
BUTTERFLIES	PROJECT: GINGER	LAURA'S DESIRES
ECSTASY GIRLS	CLIMAX!	GREAT SEXPECTATIONS
ECSTASY GIRLS II	PANDORA'S MIRROR	GARAGE GIRLS
MASCARA	BLAME IT ON GINGER	TASTY
GETTING PERSONAL	NAKED SCENTS	*TRINITY BROWN
WORLD ACCORDING TO GINGER	TOO HOT TO TOUCH	*FOR RICHER, FOR POORER
WILD THINGS II	CORPORATE ASSETS	CLUB GINGER
GENTLEMEN PREFER GINGER	WORKING GIRLS	PASSAGE THRU PAMELA
CAREFUL, HE MAY BE WATCHING	HARLEM CANDY	MIDNIGHT HEAT
UP, UP AND AWAY	V—THE HOT ONE	BALL BUSTERS
CO-ED FEVER	ANGIE: UNDERCOVER COP	DREAM GIRLS
EXTREMES	LILITH UNLEASHED	*SOUNDS OF SEX
CLITTER	RIBALD TALES OF CANTERBURY	*FLESH & FANTASY
GREAT SEXPECTATIONS	ERUPTION	BUTTERFLIES
TASTY	THE PASSION WITHIN	WORLD ACCORDING TO GINGER
FORBIDDEN BODIES	AUNT PEG	TOWER OF POWER
NAKED SCENTS	FASCINATION	SEX ASYLUM II
GARAGE GIRLS	CLUB GINGER	TRASHY LADY
STIMULATORS	*FLESH & FANTASY	*FOR RICHER FOR POORER
DESIRES WITHIN YOUNG GIRLS	*SOUNDS OF SEX	*TRINITY BROWN
LUST ON THE ORIENT EXPRESS	DREAM GIRLS	CAREFUL, HE MAY BE WATCHING
CLITTER	TABOO AMERICAN STYLE I	UP, UP AND AWAY
AUNT PEG'S FULFILLMENT	TABOO AMERICAN STYLE II	V—THE HOT ONE
PASSAGE THRU PAMELA	TABOO AMERICAN STYLE III	GENTLEMEN PREFER GINGER
THE PASSION WITHIN	TABOO AMERICAN STYLE IV	SENSATIONS
GARAGE GIRLS	*TRINITY BROWN	*SUPERGIRLS DO GENERAL HOSPITAL
WORKING GIRLS	*GOOD GIRL, BAD GIRL	*SUPERGIRLS DO THE NAVY
TRASHY LADY	*FLESH AND FANTASY	GETTING PERSONAL
BUTTERFLIES	BALL BUSTERS	*FOR RICHER, FOR POORER

*PREMIERE MOVIES

DECEMBER

SUBSCRIPTION

	10 PM (ET)	11:30 PM
TUE 1	THE GINGER EFFECT	WORKING GIRLS
WED 2	CAN'T GET ENOUGH	WILD THINGS II
THUR 3	RIBALD TALES OF CANTERBURY	IF MY MOTHER ONLY KNEW
FRI 4	*MOUTHWATERING	PROJECT GINGER
SAT 5	*ULTIMATE LOVER	GARAGE GIRLS
SUN 6	DEVIL IN MISS JONES I	CLIMAX!
MON 7	DEVIL IN MISS JONES II	TOO HOT TO TOUCH
TUE 8	DEVIL IN MISS JONES III	GENTLEMEN PREFER GINGER
WED 9	DEVIL IN MISS JONES IV	PASSAGE THRU PAMELA
THUR 10	STIMULATORS	TASTY
FRI 11	*THAT'S OUTRAGEOUS	GETTING PERSONAL
SAT 12	*SATISFIERS OF ALPHA BLUE	SUPERGIRLS DO GENERAL HOSPITAL
SUN 13	BALL BUSTERS	THE PASSION WITHIN
MON 14	BLAME IT ON GINGER	V—THE HOT ONE
TUE 15	CAREFUL, HE MAY BE WATCHING	RIBALD TALES OF CANTERBURY
WED 16	SUPERGIRLS DO THE NAVY	PEEPING TOM
THUR 17	BEVERLY HILLS COX	LUST ON THE ORIENT EXPRESS
FRI 18	*PUSSYCAT GALORE	NAKED SCENTS
SAT 19	*THROAT: 12 YEARS AFTER	TRINITY BROWN
SUN 20	1001 EROTIC NIGHTS I	GENTLEMEN PREFER GINGER
MON 21	1001 EROTIC NIGHTS II	*ULTIMATE LOVER
TUE 22	FLESH AND FANTASY	SOUNDS OF SEX
WED 23	ECSTASY GIRLS I	CLIMAX!
THUR 24	ECSTASY GIRLS II	FOR RICHER, FOR POORER
FRI 25	*EVERY WOMAN HAS A FANTASY I	THE PASSION WITHIN
SAT 26	*EVERY WOMAN HAS A FANTASY II	TRASHY LADY
SUN 27	IF MY MOTHER ONLY KNEW	NAKED SCENTS
MON 28	AUNT PEG'S FULFILLMENT	BALL BUSTERS
TUE 29	LUST ON THE ORIENT EXPRESS	THE GINGER EFFECT
WED 30	GOOD GIRL, BAD GIRL	FORBIDDEN BODIES
THUR 31	DEVIL IN MISS JONES I	DEVIL IN MISS JONES II

CHRISTMAS WISH WEEKEND

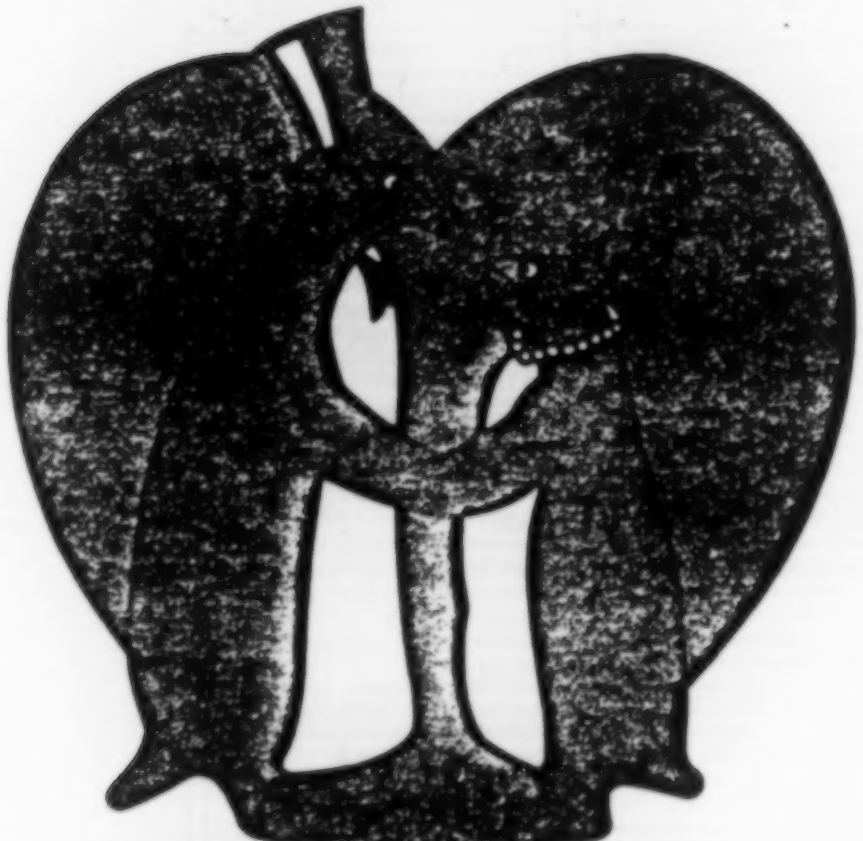
NEW YEAR'S EVE

SERVICE (XXX)

1 AM	2:30 AM	4 AM
AMANDA BY NIGHT	ANGIE: UNDERCOVER COP	THE GINGER EFFECT
1001 EROTIC NIGHTS I	BLAME IT ON GINGER	CAN'T GET ENOUGH
1001 EROTIC NIGHTS II	WORLD ACCORDING TO GINGER	RIBALD TALES OF CANTERBURY
LUST ON THE ORIENT EXPRESS	*THROAT: 12 YEARS LATER	*MOUTHWATERING
NAKED SCENTS	*PUSSYCAT GALORE	*ULTIMATE LOVER
HARLEM CANDY	TRINITY BROWN	DEVIL IN MISS JONES I
PUSS 'N BOOTS	NOTHING TO HIDE	DEVIL IN MISS JONES II
FASCINATION	ECSTASY GIRLS I	DEVIL IN MISS JONES III
MIDNIGHT HEAT	ECSTASY GIRLS II	DEVIL IN MISS JONES IV
FLESH AND FANTASY	GOOD GIRL, BAD GIRL	STIMULATORS
AUNT PEG'S FULFILLMENT	*ULTIMATE LOVER	*THAT'S OUTRAGEOUS
SOUNDS OF SEX	*MOUTHWATERING	*SATISFIERS OF ALPHA BLUE
WORKING GIRLS	FOR RICHER, FOR POORER*	BALL BUSTERS
CAN'T GET ENOUGH	TRASHY LADY	BLAME IT ON GINGER
FORBIDDEN BODIES	IF MY MOTHER ONLY KNEW	CAREFUL, HE MAY BE WATCHING
ERUPTION	PROJECT: GINGER	SUPERGIRLS DO THE NAVY
PUSS 'N BOOTS	HARLEM CANDY	BEVERLY HILLS COX
THE GINGER EFFECT	*SATISFIERS OF ALPHA BLUE	*PUSSYCAT GALORE
TOWER OF POWER	*THAT'S OUTRAGEOUS	*THROAT: 12 YEARS AFTER
TABOO AMERICAN STYLE I	GARAGE GIRLS	1001 EROTIC NIGHTS I
TABOO AMERICAN STYLE II	TASTY	1001 EROTIC NIGHTS II
TABOO AMERICAN STYLE III	TOO HOT TO TOUCH	FLESH AND FANTASY
TABOO AMERICAN STYLE IV	STIMULATORS	ECSTASY GIRLS I
GETTING PERSONAL	SEX ASYLUM II	ECSTASY GIRLS II
BLAME IT ON GINGER	*MOUTHWATERING	*EVERY WOMAN HAS A FANTASY I
WORKING GIRLS	*PUSSYCAT GALORE	*EVERY WOMAN HAS A FANTASY II
SUPERGIRLS DO GENERAL HOSPITAL	CAREFUL, HE MAY BE WATCHING	IF MY MOTHER ONLY KNEW
SUPERGIRLS DO THE NAVY	MIDNIGHT HEAT	AUNT PEG'S FULFILLMENT
CAN'T GET ENOUGH	WILD THINGS II	LUST ON THE ORIENT EXPRESS
V—THE HOT ONE	TRINITY BROWN	GOOD GIRL, BAD GIRL
DEVIL IN MISS JONES IV	DEVIL IN MISS JONES IV	DEVIL IN MISS JONES I

*PREMIERE MOVIES

COMING IN OCTOBER!



TUXEDO NETWORK

The "Playful" New Channel For Sensual Viewing

Available to Cable, Hotels, and TVRO
Featuring Non-Explicit Programming

A Division of HDO Satellite Networks, Inc.

Premiere Movies

THE ADULTRESS (1986) A cheating lady devises a plot to leave her husband. Starring Krista Lane, Shen St. Claire. March 11.

BLONDE FIRE (1979) Diamond courier John Holmes finds himself in the middle of intrigue and sex. Starring Jessie St. James. Seka. March 26.

BODIES IN HEAT (1983) Murder and theft in this heated tale of marital mischief. Starring Annette Haven, Herschel Savage. Jan. 1, 23, March 7, 26.

BRAT ON THE RUN (1986) Jamie Somers is back as the brat whose husband hires a private eye to probe into her past. Starring Shana McCullough, Tom Byron. March 26.

CHARMED FORCES (1986) An investigative reporter goes all the way to get the most in-depth interviews. Starring Krista Lane, Scott Irish. Feb. 5, 20, 29, March 18, 30.

CHINA CAT (1984) John Holmes is a private detective who goes to great lengths in a desperate search for the mysterious "china cat." Starring Eileen Welles. March 19, 29.

DEBBIE DOES 'EM ALL (1985) Angel portrays the infamous Debbie in her adventures as an airline stewardess. This time, the sky's the limit. Starring Jamie Gillis, Shana McCullough. Jan. 16, 29, Feb. 13, 27, March 1.

DEBBIE DOES DISHES (1986) This Debbie can dish it out as a spoiled newlywed who keeps house and the plumber. Starring Nina Hartley, Jerry Butler. Feb. 6, 19, 28, March 16, 28.

DIRTY DREAMS (1986) An adult magazine runs a "fantasy" contest to increase sagging sales. Starring Eric Edwards, Stacey Donovan. Jan. 22, Feb. 11, 23, March 16.

DOLL FACE (1986) Neglected teenage girl flees to San Francisco to live with her stepfather and learns about the darker side of life. Starring Sandy Summers, Eric Edwards. March 4, 19, 39.

DREAM LOVERS (1986) A very stunning Tracey Adams in a shocking house that fulfills erotic dreams. Starring Nina Hartley, John Martin. Jan. 2, 22, Feb. 14, 22, March 10, 29.

Premiere Movies

CRIME (1987) Outstanding story of a couple who remedy their ailing sex life with a visit to the neighborhood sex club. Starring Mike Horner, Shana McCullough. Feb. 27, March 13, 31.

HOT LIPS (1983) A raunchy tale of a teacher, his mute son and an all-girl rock band. A wacky time is had by all. Jan. 5, Feb. 12, 20, March 6, 24.

I WANT TO BE BAD (1984) Husband, wife and secretary clash in this exciting re-working of the traditional romantic triangle. Starring Kay Parker, John Martin. March 11.

KINKY BUSINESS (1984) The sexual adventures of an enterprising young man. Starring Tom Byron, Ginger Lynn. Jan. 1, 16, 27, March 1, 19, 31.

MATINEE IDOL (1987) Bickering porn stars force studio to find a new on-screen pair with the same appeal. Starring Angel, John Leslie. Feb. 14, March 8, 27.

MIAMI SPICE 1987) Undercover ladies bust a big-time drug dealer and deliver twice the vice. Starring Amber Lynn, Shen St. Clair. Jan. 8, 23, Feb. 2, March 9, 26.

PERFECT PARTNERS (1986) Competition between two brothers to determine who has the most satisfying spouse. Starring John Martin, Amber Lynn. Feb. 27, March 17, 27.

SEX-A-VISION (1986) Joey Silvera is a super-nerd until he miraculously trades places with a porn star and finds himself face to face with his favorite ladies. Starring Shen St. Claire, Tamara Longley. Feb. 5, 18, March 7, 23.

SOAKING WET (1985) Three women decide to publish a skin magazine and use their "charm" to raise interest in their venture. Starring Sheri St. Claire, Ron Jeremy. Feb. 12, 24, March 10, 12, 22, 24.

[redacted]

VISTA VALLEY PTA (1980) A pretty young guidance counselor tries to help a troubled high school in this steamy cross between Blackboard Jungle and Peyton Place. Starring Jessie St. James, John Leslie. March 3, 16, 29.

JANUARY

		10 PM (ET)	11:30 PM	1 AM	2:30 AM	4 AM
	FRI 1	*KINKY BUSINESS	WORKING GIRLS	NOTHING TO HIDE	HEART THROBS	*KINKY BUSINESS
	SAT 2	*DREAM LOVERS	WILD THINGS II	PROJECT: GINGER	FLESH & FANTASY	*DREAM LOVERS
	SUN 3	THROAT: 12 YEARS AFTER	THE GINGER EFFECT	SATISFIERS OF ALPHA BLUE	SWEET FREEOM	THROAT: 12 YEARS AFTER
	MON 4	THE PASSION WITHIN	UP, UP & AWAY	PUSS & BOOTS	SEXCAPADES	THE PASSION WITHIN
	TUES 5	PASSAGE THROUGH PAMELA	PEEPING TOM	GREAT SEXPECTATIONS	ECSTASY GIRLS II	PASSAGE THROUGH PAMELA
	WED 6	GENTLEMEN PREFER GINGER	THE OTHER SIDE OF JULIE	TASTY	BEACH HOUSE	GENTLEMEN PREFER GINGER
COPS 'N RUBBERS	THUR 7	ERUPTION	MASCARA	THAT'S OUTRAGEOUS	CAN'T GET ENOUGH	ERUPTION
	FRI 8	*BODIES IN HEAT	BEVERLY HILLS COX	TRINITY BROWN	*MIAMI SPICE	*BODIES IN HEAT
	SAT 9	*IN SEARCH OF THE GOLDEN BONE	ULTIMATE LOVER	GLITTER	GETTING PERSONAL	*IN SEARCH OF THE GOLDEN BONE
	SUN 10	LUST ON THE ORIENT EXPRESS	BLAME IT ON GINGER	TRASHY LADY	MOUTHWATERING	LUST ON THE ORIENT EXPRESS
	MON 11	GARAGE GIRLS	BALL BUSTERS	PLAYGIRL	FOR RICHER FOR POORER	GARAGE GIRLS
	TUE 12	SOUNDS OF SEX	FORBIDDEN BODIES	PLAYPEN	PRIVATE SCHOOL GIRLS	SOUNDS OF SEX
	WED 13	CLIMAX!	RIBALD TALES OF CANTERBURY	NOTHING TO HIDE	CLUB GINGER	CLIMAX!
	THUR 14	STIMULATORS	IF MY MOTHER ONLY KNEW	SKIN ON SKIN	WORKING GIRLS	STIMULATORS
	FRI 15	*HOT LIPS	V—THE HOT ONE	SEXCAPADES	PUSSYCAT GALORE	*HOT LIPS
	SAT 16	*DEBBIE DOES 'EM ALL	UP, UP & AWAY	THROAT: 12 YEARS AFTER	*KINKY BUSINESS	*DEBBIE DOES 'EM ALL
	SUN 17	TOO HOT TO TOUCH	CORPORATE ASSETS	HEART THROBS	TRINITY BROWN	TOO HOT TO TOUCH
	MON 18	FASCINATION	CAREFUL, HE MAY BE WATCHING	AUNT PEG	WILD THINGS II	FASCINATION
	TUE 19	TASTY	BALL BUSTERS	ERUPTION	MIDNIGHT HEAT	TASTY
	WED 20	TABOO AMERICAN STYLE I	BEVERLY HILLS COX	EVERY WOMAN HAS A FANTASY	*IN SEARCH OF THE GOLDEN BONE	TABOO AMERICAN STYLE I
	THUR 21	TABOO, AMERICAN STYLE II	GETTING PERSONAL	EVERY WOMAN HAS A FANTASY II	ODDEST COUPLE	TABOO, AMERICAN STYLE II
WET DREAMS	FRI 22	*DIRTY DREAMS	FLESH AND FANTASY	TICKLED PINK	*DREAM LOVERS	*DIRTY DREAMS
	SAT 23	*MIAMI SPICE	PASSAGE THROUGH PAMELA	GREAT SEXPECTATIONS	*BODIES IN HEAT	*MIAMI SPICE
	SUN 24	NOTHING TO HIDE	MASCARA	THE OTHER SIDE OF JULIE	LILITH UNLEASHED	NOTHING TO HIDE
	MON 25	SUPERGIRLS DO GENERAL HOSPITAL	GLITTER	WORLD ACCORDING TO GINGER	LIQUID ASSETS	SUPERGIRLS DO GENERAL HOSPITAL
	TUE 26	1001 EROTIC NIGHTS I	PUSS 'N BOOTS	HARLEM CANDY	STIMULATORS	1001 EROTIC NIGHTS
	WED 27	SUPERGIRLS DO THE NAVY	*KINKY BUSINESS	PRIVATE SCHOOL GIRLS	AUNT PEG'S FULFILLMENT	SUPERGIRLS DO THE NAVY
	THUR 28	1001 EROTIC NIGHTS II	MOUTHWATERING	FASCINATION	UP, UP & AWAY	1001 EROTIC NIGHTS II
	FRI 29	NAKED SCENTS	CLIMAX!	GARAGE GIRLS	*DEBBIE DOES 'EM ALL	NAKED SCENTS
HI-TECH SEX	SAT 30	ULTIMATE LOVER	PROJECT: GINGER	SATISFIERS OF ALPHA BLUE	TASTY	ULTIMATE LOVER
	SUN 31	THAT'S OUTRAGEOUS	SEXCAPADES	PUSSYCAT GALORE	SKIN ON SKIN	THAT'S OUTRAGEOUS

Be Our Valentine

SUNDAY FEBRUARY 14

Here's a special delivery of the most sensuous valentines around—sealed with more than a kiss. Four romantic tales of desire and fantasy are set to arrive on February 14th. First, the romance explodes from ***THE PASSION WITHIN***, pairing steamy Nina Hartley and John Leslie. Next there's ***NOTHING TO HIDE*** as sensitive Richard Pacheco finds true love in Chelsea Manchester. Then stunning Tracey Adams learns wishes can come true in ***DREAM LOVERS***. And it's the awaited premiere of ***MATINEE IDOL*** with John Leslie and Jessie St. James as a pair of playful lovers. It's a heart-warming collection of couples sure to heat up this February night.

Bizzaro Night SATURDAY MARCH 5

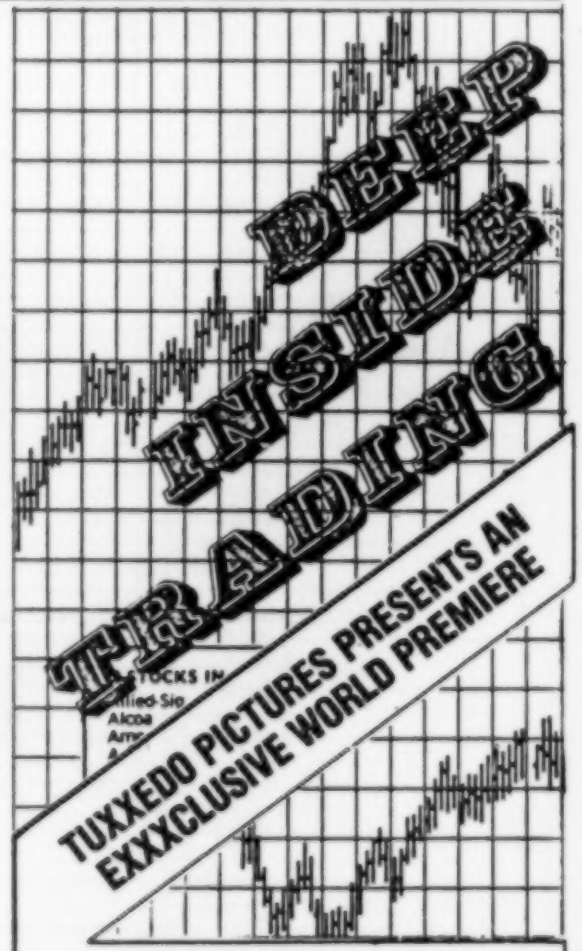
This time it's strangeness in paradise—and everyone's gone mad! It's a full night of super-lonky escapades on March 16th. Joanna storm puts in a performance of a lifetime when she gets put away in ***CRAZY WITH THE HEAT***. Next, listen to the ***SOUNDS OF SEX*** and learn the bizzare desires of a woman who loves what she hears. Then take a ***PASSAGE THROUGH PAMELA*** in this shocking tale of a he/she sex fiend. But ultimately, there is no cure for the sexually insane in ***SEX ASYLUM II***. Everyone will be bouncing off the walls when Bizzaro Night comes to American Exxxtasy.

COPS 'N RUBBERS NIGHT FRIDAY JANUARY 8

Calling all cars! Be on the lookout for a torrid evening of private dicks and criminal cop-ulation! It's Cops 'n Rubbers Night starting at 10 pm on January 8th with the premiere of ***BODIES IN HEAT***. A corrupt cop falls for ultra-sexy Annette Haven who specializes in breaking the law and giving the orders. Next, the Heat is really on for Ginger Lynn in ***BEVERLY HILLS COX*** as she searches for the "boner bandit." And she's not the only one looking for a hardened criminal. Colleen Brennan as ***TRINITY BROWN*** packs her own pistols when she investigates a mysterious mob murder. Finally, Amber Lynn and Sheri St. Claire deliver twice the vice in the seasoned premiere of ***MIAMI SPICE***. These two ladies go undercover for the big bust, and anything's in the line of duty. It's a hot line-up that'll leave you calling for a citizen's arrest!

HIGH TECH SEX SATURDAY JANUARY 30

Take out your erector sets! It's an evening of science-friction and very popular mechanics starting at 10 pm on January 30th with ***ULTIMATE LOVER***. Nina Hartley and Tracey Adams are love-mad scientists who construct the perfect hunk. Next, Tom Byron's got an experiment of his own as an eager student with a chemical attraction for Ginger Lynn in ***PROJECT GINGER***. Then journey to the future for sci-fi excitement and ultimate fulfillment from the ***SATISFIERS OF ALPHA BLUE***. Finally, it's back to earth as Hypatia Lee heats up the airways in ***TASTY***. This is one dynamic night that's sure to blow a fuse!



AMERICAN EXXXTASY delivers cold hard cash and Wall Street heat with the exxxclusive world premier of ***DEEP INSIDE TRADING***. From the filmmakers who brought you the fabulous ***WANDA WHIPS WALL STREET***, here comes a raunchy expose of the scandal that brought Wall Street to its knees. A shocking sensuous feature film starring Krista Lane, Sheri St. Claire, Rick Savage and Siobhan Hunter. It's triple X action, and you'll see it first—prior to its worldwide theatrical release. Premiering February 19th with an encore presentation March 17th.

FEBRUARY

			10 PM (ET)	11:30 PM
	MON	1	RIBALD TALES OF CANTERBURY	HOT LIPS
	TUES	2	MIAMI SPICE	BEACH HOUSE
	WED	3	THROAT: 12 YEARS AFTER	SOUNDS OF SEX
BOOB TUBE NIGHT	THUR	4	TRASHY LADY	LUST ON THE ORIENT EXPRESS
	FRI	5	*SEX-A-VISION	CAREFUL, HE MAY BE WATCHING
	SAT	6	*DEBBIE DUZ DISHES I	PLAYPEN
	SUN	7	BEVERLY HILLS COX	WORKING GIRLS
	MON	8	BLAME IT ON GINGER	DEVIL IN MISS JONES I
	TUES	9	GREAT SEXPECTATIONS	DEVIL IN MISS JONES II
	WED	10	TICKLED PINK	DEVIL IN MISS JONES III
	THUR	11	CORPORATE ASSETS	DEVIL IN MISS JONES IV
	FRI	12	*SOAKING WET	ODDEST COUPLE
BE OUR VALENTINE	SAT	13	*DEBBIE DOES 'EM ALL	UP, UP & AWAY
	SUN	14	THE PASSION WITHIN	NOTHING TO HIDE
	MON	15	HARLEM CANDY	AUNT PEG'S FULFILLMENT
	TUES	16	MOUTHWATERING	STIMULATORS
	WED	17	FASCINATION	BALL BUSTERS
	THUR	18	ERUPTION	LILITH UNLEASHED
	FRI	19	DEEP INSIDE TRADING	SATISFIERS OF ALPHA BLUE
	SAT	20	*CHARMED FORCES	PUSSYCAT GALORE
	SUN	21	1001 EROTIC NIGHTS I	FLESH & FANTASY
	MON	22	DREAM LOVERS	WILD THINGS II
	TUES	23	ODDEST COUPLE	DIRTY DREAMS
	WED	24	TASTY	THE OTHER SIDE OF JULIE
	THUR	25	1001 EROTIC NIGHTS II	PASSAGE THROUGH PAMELA
	FRI	26	*SHOWDOWN	MASCARA
	SAT	27	*GRIND	CLIMAX!
	SUN	28	SKIN ON SKIN	*DEBBIE DUZ DISHES I
	MON	29	CAN'T GET ENOUGH	*CHARMED FORCES

1 AM	2:30 AM	4 AM
CLIMAX!	PLAYGIRL	RIBALD TALES OF CANTERBURY
IF MY MOTHER ONLY KNEW	V—THE HOT ONE	MIAMI SPICE
FORBIDDEN BODIES	ERUPTION	THROAT: 12 YEARS AFTER
WILD THINGS II	BODIES IN HEAT	TRASHY LADY
PEEPING TOM	*CHARMED FORCES	*SEX-A-VISION
CAN'T GET ENOUGH	BALL BUSTERS	*DEBBIE DUZ DISHES I
EVERY WOMAN HAS A FANTASY I	PASSAGE THROUGH PAMELA	BEVERLY HILLS COX
STIMULATORS	ECSTASY GIRLS II	BLAME IT ON GINGER
GETTING PERSONAL	GARAGE GIRLS	GREAT SEXPECTATIONS
TRINITY BROWN	EVERY WOMAN HAS A FANTASY II	TICKLED PINK
DIRTY DREAMS	MASCARA	CORPORATE ASSETS
WORLD ACCORDING TO GINGER	IN SEARCH OF GOLDEN BONE	*SOAKING WET
TABOO AMERICAN STYLE I	TABOO AMERICAN STYLE II	*DEBBIE DOES 'EM ALL
DREAM LOVERS	*MATINEE IDOL	THE PASSION WITHIN
TABOO AMERICAN STYLE III	TABOO AMERICAN STYLE IV	HARLEM CANDY
PROJECT: GINGER	CAN'T GET ENOUGH	MOUTHWATERING
SKIN ON SKIN	TRASHY LADY	FASCINATION
RIBALD TALES OF CANTERBURY	*SEX-A-VISION	ERUPTION
IF MY MOTHER ONLY KNEW	*DEBBIE DUZ DISHES I	*VISTA VALLEY PTA
THAT'S OUTRAGEOUS	*VISTA VALLEY PTA	*CHARMED FORCES
THROAT: 12 YEARS AFTER	SWEET FREEDOM	1001 EROTIC NIGHTS I
GENTLEMEN PREFER GINGER	CORPORATE ASSETS	DREAM LOVERS
WORKING GIRLS	SOUNDS OF SEX	ODDEST COUPLE
PUSS 'N BOOTS	*SOAKING WET	TASTY
MOUTHWATERING	NOTHING TO HIDE	1001 EROTIC NIGHTS II
UP, UP & AWAY	TICKLED PINK	*SHOWDOWN
DEBBIE DOES 'EM ALL	*PERFECT PARTNERS	*GRIND
THE PASSION WITHIN	HONEYSUCKLE ROSE	SKIN ON SKIN
ERUPTION	IN SEARCH OF THE GOLDEN BONE	CAN'T GET ENOUGH

MARCH

		10 PM (ET)	11:30 PM	1 AM	2:30 AM	4 AM
	TUES 1	KINKY BUSINESS	FORBIDDEN BODIES	1001 EROTIC NIGHTS I	SEXCAPADES	KINKY BUSINESS
	WED 2	HARLEM CANDY	[redacted]	EVERY WOMAN HAS A FANTASY I	ERUPTION	HARLEM CANDY
	THUR 3	WORLD ACCORDING TO GINGER	VISTA VALLEY PTA	TRASHY LADY	BEACH HOUSE	WORLD ACCORDING TO GINGER
	FRI 4	*DOLL FACE	MIDNIGHT HEAT	AUNT PEG	BALL BUSTERS	*DOLL FACE
BIZZARO NIGHT	SAT 5	*CRAZY WITH THE HEAT	SOUNDS OF SEX	PASSAGE THROUGH PAMELA	SEX ASYLUM II	*CRAZY WITH THE HEAT
	SUN 6	HOT LIPS	TRINITY BROWN	PUSSYCAT GALORE	CLUB GINGER	HOT LIPS
	MON 7	ECSTASY GIRLS II	GREAT SEXPECTATIONS	SEX-A-VISION	BODIES IN HEAT	ECSTASY GIRLS II
	TUES 8	AUNT PEG'S FULFILLMENT	MATINEE IDOL	CAREFUL. HE MAY BE WATCHING	V--THE HOT ONE	AUNT PEG'S FULFILLMENT
	WED 9	MIAMI SPICE	WORKING GIRLS	THAT'S OUTRAGEOUS	GETTING PERSONAL	MIAMI SPICE
YOUR CHEATIN' HEART	THUR 10	SATISFIERS OF ALPHA BLUE	SOAKING WET	THROAT: 12 YEARS AFTER	DREAM LOVERS	SATISFIERS OF ALPHA BLUE
	FRI 11	*I WANT TO BE BAD	GENTLEMEN PREFER GINGER	IF MY MOTHER ONLY KNEW	*THE ADULTRESS	*I WANT TO BE BAD
	SAT 12	[redacted]	SOAKING WET	LILITH UNLEASHED	AUNT PEG	[redacted]
	SUN 13	[redacted]	SOUNDS OF SEX	IN SEARCH OF THE GOLDEN BONE	GRIND	[redacted]
	MON 14	TRASHY LADY	CLIMAX!	FORBIDDEN BODIES	DEBBIE DOES 'EM ALL	TRASHY LADY
	TUES 15	ERUPTION	SKIN ON SKIN	HARLEM CANDY	IF MY MOTHER ONLY KNEW	ERUPTION
	WED 16	DIRTY DREAMS	NOTHING TO HIDE	DEBBIE DUZ DISHES I	VISTA VALLEY PTA	DIRTY DREAMS
	THUR 17	DEEP INSIDE TRADING	SEXCAPADES	CORPORATE ASSETS	PERFECT PARTNERS	DEEP INSIDE TRADING
	FRI 18	*MATING SEASON	PROJECT: GINGER	CHARMED FORCES	*CRAZY WITH THE HEAT	*MATING SEASON
	SAT 19	*CHINA CAT	KINKY BUSINESS	AUNT PEG'S FULFILLMENT	*DOLLFACE	*CHINA CAT
	SUN 20	RIBALD TALES OF CANTERBURY	LUST ON THE ORIENT EXPRESS	TASTY	HEART THROBS	RIBALD TALES OF CANTERBURY
	MON 21	MOUTHWATERING	BALL BUSTERS	THE OTHER SIDE OF JULIE	MIDNIGHT HEAT	MOUTHWATERING
	TUES 22	BEACH HOUSE	UP, UP & AWAY	SOAKING WET	THAT'S OUTRAGEOUS	BEACH HOUSE
	WED 23	SEX-A-VISION	SATISFIERS OF ALPHA BLUE	PUSS 'N BOOTS	1001 EROTIC NIGHTS II	SEX-A-VISION
	THUR 24	ODDEST COUPLE	HOT LIPS	SOAKING WET	EVERY WOMAN HAS A FANTASY II	ODDEST COUPLE
	FRI 25	SHOWDOWN	PASSAGE THROUGH PAMELA	CLUB GINGER	[redacted]	SHOWDOWN
PRIVATE DICKS	SAT 26	*BRAT ON THE RUN	BODIES IN HEAT	MIAMI SPICE	*BLONDE FIRE	*BRAT ON THE RUN
	SUN 27	PERFECT PARTNERS	LILITH UNLEASHED	MATINEE IDOL	MASCARA	PERFECT PARTNERS
	MON 28	1001 EROTIC NIGHTS I	*CRAZY WITH THE HEAT	ERUPTION	DEBBIE DUZ DISHES I	1001 EROTIC NIGHTS I
	TUES 29	DREAM LOVERS	VISTA VALLEY PTA	[redacted]	*CHINA CAT	DREAM LOVERS
	WED 30	CHARMED FORCES	FORBIDDEN BODIES	*DOLL FACE	HARLEM CANDY	CHARMED FORCES
	THUR 31	GRIND	NOTHING TO HIDE	KINKY BUSINESS	*MATING SEASON	GRIND

TUXEDO NETWORK

This is your invitation to enjoy the most sophisticated, the most enticing adult programming on television. The Tuxxedo Network brings you a stunning collection of the finest romantic films, seven showings nightly. Enjoy our monthly premieres and exclusive first run titles. And Tuxxedo offers a tempting line-up of playfully sensuous featurettes including amusing sports, candid profiles and loving couples. So make it an evening of Tuxxedo treats, or indulge yourself in a weekend package.

Here's a peek at some of the special featurettes coming your way—sprinkled throughout every evening of Tuxxedo:

THE OLDEST PROFESSION Candid comments and enticing tales revealed by the most beautiful —and expensive—ladies in Beverly Hills.

PENGUIN FACTS An in-depth study of the most interesting bird in California—the Tuxxedo Penguinette. In her natural habitat or in the laboratory, the Penguinette is a willing subject in all our scientific experiments.

TUXXEDO Invites You And A Loved One To Lie Back And Enjoy...

GALAXY 2
TRANSPONDER 10

AMERICAN EXXXTASY

MAY
JUNE 1988

ROUGH DRAFT
PREMIERES
MAY 6

SPACENET 1/18
VIDEOCIPHER II
DESCRAMBLER

Premier Movies

BEYOND DESIRE (1986) A private detective investigates ongoings at the local brothel. Starring Seka, John Leslie. June 17, 30.

BLUE ECSTASY IN NEW YORK (1980) A prudish young lady clashes with her very uninhibited alter ego. Starring Leslie Bovee, Samantha Fox. May 14, 27, June 21.

COFFEE, TEA OR ME (1982) Airline hi-jinx on the ground and at 30,000 feet. Starring Jamie Gillis, Juliet Anderson. April 2, 14, 27, June 15.

DARK ANGEL (1982) A millionaire haunted by a dream woman tries his hand at every diversion and perversion imaginable. Starring Jamie Gillis. June 3, 18.

DEAR FANNY (1985) An outrageous advice column offers sexual guidance to a wide array of eager readers. Starring Gina Carrera, Richard Bolla, Amber Lynn. May 6, 21, June 14.

EASY (1978) Jessie St. James in her first film as a teacher who's overly concerned with student affairs. Starring Desiree Cousteau, Richard Pacheco. April 16, May 24, June 23.

EROTIC CITY (1985) High power executives engage in more than office work. Starring Jamie Gillis, Amber Lynn. May 14, 27, June 12, 28.

HEIDE A. (1986) The amusing recollections of an insatiable young lady who bares it all on the psychiatrist's couch. April 1, 22, May 1, 24, June 15.

LUSTFUL FEELINGS (1984) A small time hustler turns to the streets to raise some cash. Excellent Kemal Horulu production with superb photography and a sophisticated script. Starring Leslie Bovee, Jamie Gillis. June 17, 29.

MAKING IT BIG (1984) Country girl takes on tinsel town in this classic re-working of the Hollywood Dream. Starring Jacqueline Lorians, Shaun Michelle. May 7, 24.

THE MISTRESS (1982) Kelly Nichols is the other woman who won't let single men tie her down. Starring Richard Pacheco, Juliet Anderson. April 8, 18, 29, June 23.

NASTY LADY (1984) Cultures clash as country girl Tara Aire takes on the streetwise scene in San Francisco. Starring Mai Lin, Erica Boyer, Paul Thomas. May 20, 31, June 16.

SEDUCTION OF LANA SHORE (1984) G-rated film sensation sacrifices her reputation in this tempting tale of Mary Poppins meets the eighties. Starring Laurie Smith, Eric Edwards. June 3, 18, 30.

STRANGE BEDFELLOWS (1985) The guests of a hideaway mountain resort get an unexpected taste of brown sugar with the sudden arrival of two streetwise ladies. Starring Jeannie Pepper, Jerry Butler. June 11, 29.

3 AM (1978) Family squabbles and infidelities escalate into incest and murder. Starring Georgina Spelvin, Charles Hopper. June 11, 27.

VIRGIN AND THE LOVER (1982) A porn movie director is racked with guilt over his forbidden secret. Starring Eric Edwards, Leah Marlon. June 4, 24.

WHEN SHE WAS BAD (1983) Another outstanding turn from director Kemal Horulu. Bittersweet, seductive tale of a promiscuous couple and their confused daughter. Noted performances by Georgina Spelvin, John Leslie, Chelsea Manchester. May 20, 30, June 5.

WOMAN IN LOVE (1980) The steamy affairs of a suburban housewife whose husband prefers his business over her pleasure. Starring Laurien Dominique, Richard Bolla. April 15, 30, May 17, June 22.

NEVER SLEEP ALONE (1984) Innovative adult film exploring relationships, sensuality and infidelity. Starring John Leslie, Victoria Jackson. April 8, 30, May 19, June 11.

PINK AND PRETTY (1986) The erotic art of self-defense as mastered by some very demanding ladies. Gentlemen beware. Starring Danielle, Porsche Lynn, Buck Adams. May 13, 28.

PLAY ME AGAIN, VANESSA (1986) A beautiful woman's obsession with a porn superstar leads to some very learning experiences. Starring Vanessa Del Rio, Taija Rae. June 4, 24.

PLEASE DON'T STOP (1986) Luscious Amber Lynn trades places with an unattractive stranger in this sensuous comedy of mistaken identity. Starring Sheri St. Claire, Jamie Gillis. April 16, 26, June 28.

PRIVATE MOMENTS (1984) A sensuous study of workaholic attorneys and their dissatisfied wives. Starring Tom Byron, Honey Wilder. April 15, May 3, June 8, 26.

ROUGH DRAFT (1986) Uninspired author contends with frisky wife, nosey neighbors and an interminable case of writer's block. Starring Jocko, Sharon Mitchell. May 6, 28, June 9, 20.

APRIL

		10 PM (ET)	11:30 PM	1 AM	2:30 AM	4:00 AM
APRIL FOOLS NIGHT	FRI 1	*HEIDI A	ODDEST COUPLE	FASCINATION	GENTLEMEN PREFER GINGER	*HEIDI A
WILD BLUE YONDER	SAT 2	*COFFEE, TEA, OR ME	UP, UP & AWAY	DEBBIE DOES 'EM ALL	ERUPTION	*COFFEE, TEA, OR ME
	SUN 3	BALL BUSTERS	CAN'T GET ENOUGH	HARLEM CANDY	AUNT PEG'S FULFILLMENT	BALL BUSTERS
	MON 4	ULTIMATE LOVER	[redacted]	WORLD ACCORDING TO GINGER	DIRTY DREAMS	ULTIMATE LOVER
	TUE 5	SEXCAPADES	NOTHING TO HIDE	MIDNIGHT HEAT	BLAME IT ON GINGER	SEXCAPADES
	WED 6	AUNT PEG	1001 EROTIC NIGHTS I	HOT LIPS	TRINITY BROWN	AUNT PEG
	THUR 7	THE ADULTRESS	BRAT ON THE RUN	WORKING GIRLS	DEVIL IN MISS JONES I	THE ADULTRESS
THE OTHER WOMAN	FRI 8	*THE MISTRESS	IF MY MOTHER ONLY KNEW	THE ADULTRESS	*NEVER SLEEP ALONE	*THE MISTRESS
	SAT 9	SEX ASYLUM II	ODDEST COUPLE	I WANT TO BE BAD	DEEP INSIDE TRADING	SEX ASYLUM II
	SUN 10	DREAM LOVERS	TASTY	HEART THROBS	BLONDE FIRE	DREAM LOVERS
	MON 11	TABOO AMERICAN STYLE III	TABOO AMERICAN STYLE IV	MATING SEASON	CHINA CAT	TABOO AMERICAN STYLE III
	TUE 12	GETTING PERSONAL	GENTLEMEN PREFER GINGER	MIAMI SPICE	SOUNDS OF SEX	GETTING PERSONAL
	WED 13	V—THE HOT ONE	1001 EROTIC NIGHTS II	SATISFIERS OF ALPHA BLUE	SOAKING WET	V—THE HOT ONE
	THUR 14	PASSAGE THRU PAMELA	MATINEE IDOL	MOUTHWATERING	*COFFEE, TEA OR ME	PASSAGE THRU PAMELA
SUBURBAN SATISFIERS	FRI 15	*WOMAN IN LOVE	THE OTHER SIDE OF JULIE	FOR RICHER FOR POORER	*PRIVATE MOMENTS	*WOMAN IN LOVE
I WANT TO LEARN	SAT 16	*EASY	GRIND	VISTA VALLEY PTA	*PLEASE DON'T STOP	*EASY
	SUN 17	BALL BUSTERS	THAT'S OUTRAGEOUS	SEX ASYLUM II	BEACH HOUSE	BALL BUSTERS
	MON 18	DOLL FACE	*THE MISTRESS	CHARMED FORCES	BRAT ON THE RUN	DOLL FACE
	TUE 19	CRAZY WITH THE HEAT	TRINITY BROWN	DEEP INSIDE TRADING	ULTIMATE LOVER	CRAZY WITH THE HEAT
	WED 20	[redacted]	DIRTY DREAMS	DEVIL IN MISS JONES II	SKIN ON SKIN	[redacted]
	THUR 21	HARLEM CANDY	KINKY BUSINESS	BLAME IT ON GINGER	LIQUID ASSETS	HARLEM CANDY
	FRI 22	PUSSYCAT GALORE	EVERY WOMAN HAS A FANTASY I	DIRTY DREAMS	*HEIDI A	PUSSYCAT GALORE
	SAT 23	MIAMI SPICE	EVERY WOMAN HAS A FANTASY II	STIMULATORS	IN SEARCH OF THE GOLDEN BONE	MIAMI SPICE
	SUN 24	DEBBIE DOES 'EM ALL	SEX-A-VISION	DEVIL IN MISS JONES III	MASCARA	DEBBIE DOES 'EM ALL
	MON 25	CLUB GINGER	MATINEE IDOL	PLAYGIRL	AUNT PEG	CLUB GINGER
	TUE 26	MOUTHWATERING	FORBIDDEN BODIES	*PLEASE DON'T STOP	TASTY	MOUTHWATERING
	WED 27	TRASHY LADY	*COFFEE, TEA OR ME	OTHER SIDE OF JULIE	PASSAGE THRU PAMELA	TRASHY LADY
	THUR 28	TICKLED PINK	THAT'S OUTRAGEOUS	*EASY	DEVIL IN MISS JONES IV	TICKLED PINK
	FRI 29	CORPORATE ASSETS	SATISFIERS OF ALPHA BLUE	BLONDE FIRE	*THE MISTRESS	CORPORATE ASSETS
	SAT 30	*NEVER SLEEP ALONE	CHINA CAT	[redacted]	*WOMAN IN LOVE	*NEVER SLEEP ALONE

*PREMIERING THIS MONTH
PROGRAMMING SUBJECT TO CHANGE

APRIL FOOLS NIGHT

APRIL 1

The laugh's on us with a hilarious line-up of prank-pulling flicks that will tickle more than your funny bone! The April Fools antics begin with the premiere of **HEIDI A.** She's an eager young "princess" with a lot to talk about! Next, prim and proper Siobhan Hunter clashes with uninhibited Danielle in the frivolous and funny **THE ODDEST COUPLE.** Then Ron Jeremy plays the fool as a naughty nerd in **FASCINATION.** And Ginger Lynn arrives with an ever-growing collection of husbands in the playful **GENTLEMEN PREFER GINGER.** Enjoy a naughty night of tempting tricks and feverish fun!

THE NAKED CITY

MAY 14

American Exxxtasy takes you to town for a dynamic evening of suspense and seduction in the **NAKED CITY.** Go downtown with Leslie Bovee and Samantha Fox in the steamy drama **BLUE ECSTASY IN NEW YORK.** Then Lisa LeLeeuw gets you uptown with those hardworking **GARAGE GIRLS.** The next stop is Wall Street as Krista Lane and Rick Savage go for broke in the Exxxtasy Exxxclusive **DEEP INSIDE TRADING.** And Amber Lynn and Jamie Gillis take you on a torrid tour through **EROTIC CITY.** It's a

SUBURBAN SATISFIERS

Grab a glimpse at those frustrated wives and cheating husbands when American Exxxtasy presents **SUBURBAN SATISFIERS**—an engaging evening of mischievious mates and extra-special marital affairs. The cheating begins with the steamy escapades of a **WOMAN IN LOVE** starring Latin Spitfire Vanessa Del Rio. Wayward wife Susannah French pairs with John Leslie to explore the **OTHER SIDE OF JULIE.** Next, Georgina Spelvin is the abandoned woman thrust into single life in **FOR RICHER, FOR POORER.** And an astonishing array of unfulfilled wives turn their fantasies into satisfying **PRIVATE MOMENTS.** An entire evening dedicated to adulterous adoration!

APRIL 15

JUNE 11

Let American Exxxtasy tuck you in with an alluring line-up of **BEDTIME STORIES.** The enticing tales begin when two streetwise ladies invade a mountain retreat in the June premiere of **STRANGE BEDFELLOWS.** Then John Leslie and Victoria Jackson retreat to the bedroom in the highly provocative **NEVER SLEEP ALONE.** The bedtime antics continue with Krista Lane in the entertaining tribute to burlesque, **FORBIDDEN BODIES.** And **3 A.M.** is the time for passion in this daring drama starring Georgina Spelvin. An evening of bedtime's best—you'll live happily ever after!

FLIGHTS OF FANTASY

American Exxxtasy soars with a high-flying evening of frivolous fantasies. A stunning dream woman haunts Jamie Gillis in the Exxxtasy premiere of **DARK ANGEL.** Dreams become reality for Eric Edwards and Stacey Donovan in the daring drama **DIRTY DREAMS.** Then enjoy a double dose of passionate fantasies with **THE PASSION WITHIN** starring Nina Hartley and John Leslie and **THE SEDUCTION OF LANA SHORE,** an inviting June premiere. Let your imagination run wild!

JUNE 3

MAY

		10 PM (ET)	11:30 PM	1 AM	2:30 AM	4:00 AM
	SUN 1	BALL BUSTERS	*HEIDI A	TRINITY BROWN	GETTING PERSONAL	BALL BUSTERS
	MON 2	STIMULATORS	IF MY MOTHER ONLY KNEW	PEEPING TOM	I WANT TO BE BAD	STIMULATORS
	TUE 3	CHARMED FORCES	*PRIVATE MOMENTS	LILITH UNLEASHED	GENTLEMEN PREFER GINGER	CHARMED FORCES
	WED 4	BRAT ON THE RUN	V—THE HOT ONE	NAKED SCENTS	PASSION WITHIN	BRAT ON THE RUN
	THUR 5	ULTIMATE LOVER	WORLD ACCORDING TO GINGER	VISTA VALLEY PTA	HARLEM CANDY	ULTIMATE LOVER
DIRTY BOOKS AND DIRTY LOOKS	FRI 6	*DEAR FANNY	DIRTY DREAMS	SOAKING WET	*ROUGH DRAFT	*DEAR FANNY
	SAT 7	*MAKING IT BIG	DOLL FACE	MASCARA	ODDEST COUPLE	*MAKING IT BIG
	SUN 8	LIQUID ASSETS	CRAZY WITH THE HEAT	KINKY BUSINESS	MATING SEASON	LIQUID ASSETS
	MON 9	TASTY	BLONDE FIRE	IN SEARCH OF THE GOLDEN BONE	PERFECT PARTNERS	TASTY
	TUE 10	MATINEE IDOL	OTHER SIDE OF JULIE	CLUB GINGER	ERUPTION	MATINEE IDOL
	WED 11	THE MISTRESS	CHINA CAT	CAREFUL, HE MAY BE WATCHING	MIAMI SPICE	THE MISTRESS
	THUR 12	PUSSYCAT GALORE	BALL BUSTERS	HOT LIPS	SATISFIERS OF ALPHA BLUE	PUSSYCAT GALORE
SURPRISE FRIDAY	FRI 13	????????	????????	???????	???????	???????
THE NAKED CITY	SAT 14	*BLUE ECSTASY IN NEW YORK	GARAGE GIRLS	DEEP INSIDE TRADING	*EROTIC CITY	*BLUE ECSTASY IN NEW YORK
	SUN 15	WILD THINGS II	[illegible]	FORBIDDEN BODIES	PEEPING TOM	WILD THINGS II
	MON 16	DEVIL IN MISS JONES I	SEX-A-VISION	THE ADULTRESS	EVERY WOMAN HAS A FANTASY I	DEVIL IN MISS JONES I
	TUE 17	DEVIL IN MISS JONES II	FOR RICHER FOR POORER	*WOMAN IN LOVE	1001 EROTIC NIGHTS I	DEVIL IN MISS JONES II
	WED 18	DEVIL IN MISS JONES III	TRASHY LADY	BLAME IT ON GINGER	EVERY WOMAN HAS A FANTASY II	DEVIL IN MISS JONES III
	THUR 19	DEVIL IN MISS JONES IV	*NEVER SLEEP ALONE	LILITH UNLEASHED	1001 EROTIC NIGHTS II	DEVIL IN MISS JONES IV
BAD GIRLS WEEKEND	FRI 20	*NASTY LADY	VISTA VALLEY PTA	[illegible]	*WHEN SHE WAS BAD	*NASTY LADY
	SAT 21	DEBBIE DUZ DISHES I	NAKED SCENTS	CLUB GINGER	*DEAR FANNY	DEBBIE DUZ DISHES I
	SUN 22	PERFECT PARTNERS	ODDEST COUPLE	OTHER SIDE OF JULIE	HOT LIPS	PERFECT PARTNERS
	MON 23	PASSAGE THRU PAMELA	FASCINATION	BALL BUSTERS	HARLEM CANDY	PASSAGE THRU PAMELA
	TUE 24	*EASY	KINKY BUSINESS	*MAKING IT BIG	*HEIDI A	*EASY
	WED 25	IN SEARCH OF THE GOLDEN BONE	ERUPTION	PLAYGIRL	TRINITY BROWN	IN SEARCH OF THE GOLDEN BONE
	THUR 26	GETTING PERSONAL	AUNT PEG	GRIND	GREAT SEXPECTATIONS	GETTING PERSONAL
	FRI 27	*EROTIC CITY	MIAMI SPICE	GINGER EFFECT	*BLUE ECSTASY IN NEW YORK	*EROTIC CITY
	SAT 28	*ROUGH DRAFT	PASSION WITHIN	SATISFIERS OF ALPHA BLUE	*PINK AND PRETTY	*ROUGH DRAFT
	SUN 29	SOUNDS OF SEX	1001 EROTIC NIGHTS I	GARAGE GIRLS	CORPORATE ASSETS	SOUNDS OF SEX
	MON 30	*WHEN SHE WAS BAD	1001 EROTIC NIGHTS II	MATING SEASON	DEBBIE DOES 'EM ALL	*WHEN SHE WAS BAD
	TUE 31	BLONDE FIRE	HIGH SCHOOL MEMORIES	SEX-A-VISION	*NASTY LADY	BLONDE FIRE

*PREMIERING THIS MONTH
PROGRAMMING SUBJECT TO CHANGE

JUNE

		10 PM (ET)	11:30 PM
	WED 1	NAKED SCENTS	AUNT PEG
	THUR 2	GETTING PERSONAL	NOTHING TO HIDE
FLIGHTS OF FANTASY	FRI 3	*DARK ANGEL	*DIRTY DREAMS
TEACH ME TONIGHT	SAT 4	*THE VIRGIN & THE LOVER	[redacted]
	SUN 5	*WHEN SHE WAS BAD	CRAZY WITH THE HEAT
	MON 6	PEEPING TOM	MIDNIGHT HEAT
	TUE 7	FOR RICHER FOR POORER	LILITH UNLEASHED
	WED 8	FASCINATION	*PRIVATE MOMENTS
	THUR 9	SEX-A-VISION	ODDEST COUPLE
	FRI 10	ULTIMATE LOVER	TRASHY LADY
BEDTIME STORIES	SAT 11	*STRANGE BEDFELLOWS	*NEVER SLEEP ALONE
	SUN 12	MOUTHWATERING	SEXCAPADES
	MON 13	AUNT PEG	IN SEARCH OF THE GOLDEN BONE
	TUE 14	CORPORATE ASSETS	GETTING PERSONAL
	WED 15	*HEIDI A	PERFECT PARTNERS
	THUR 16	*NASTY LADY	CAREFUL, HE MAY BE WATCHING
OUT OF CONTROL	FRI 17	*BEYOND DESIRE	CRAZY WITH THE HEAT
	SAT 18	*SEDUCTION OF LANA SHORE	[redacted]
	SUN 19	SHE'S A BOY TOY	NOTHING TO HIDE
	MON 20	*ROUGH DRAFT	IF MY MOTHER ONLY KNEW
	TUE 21	*BLUE ECSTASY IN NEW YORK	[redacted]
	WED 22	*WOMAN IN LOVE	FASCINATION
	THUR 23	*EASY	CHARMED FORCES
	FRI 24	*PLAY ME AGAIN VANESSA	GREAT SEXPECTATIONS
	SAT 25	AUNT PEG'S FULFILLMENT	BLAME IT ON GINGER
	SUN 26	THE ADULTRESS	*PRIVATE MOMENTS
	MON 27	CRAZY WITH THE HEAT	*3:AM
	TUE 28	GRIND	*PLEASE DON'T STOP
	WED 29	*STRANGE BEDFELLOWS	*LUSTFUL FEELINGS
	THUR 30	*SEDUCTION OF LANA SHORE	MOUTHWATERING

1 AM	2:30 AM	4:00 AM
[redacted]	IF MY MOTHER ONLY KNEW	NAKED SCENTS
GARAGE GIRLS	DEVIL IN MISS JONES I	GETTING PERSONAL
PASSION WITHIN	*SEDUCTION OF LANA SHORE	*DARK ANGEL
PLAYGIRL	*PLAY ME AGAIN VANESSA	*THE VIRGIN & THE LOVER
PASSAGE THRU PAMELA	ERUPTION	*WHEN SHE WAS BAD
[redacted]	SKIN ON SKIN	PEEPING TOM
GREAT SEXPECTATIONS	MIAMI SPICE	FOR RICHER FOR POORER
I WANT TO BE BAD	HARLEM CANDY	FASCINATION
*ROUGH DRAFT	DEVIL IN MISS JONES II	SEX-A-VISION
CHARMED FORCES	KINKY BUSINESS	ULTIMATE LOVER
FORBIDDEN BODIES	*3:AM	*STRANGE BEDFELLOWS
*EROTIC CITY	NAKED SCENTS	MOUTHWATERING
TALK DIRTY TO ME III	LIQUID ASSETS	AUNT PEG
TALK DIRTY TO ME IV	*DEAR FANNY	CORPORATE ASSETS
SOUNDS OF SEX	*COFFEE, TEA OR ME	*HEIDI A
DIRTY DREAMS	DEVIL IN MISS JONES III	*NASTY LADY
MATING SEASON	*LUSTFUL FEELINGS	*BEYOND DESIRE
1001 EROTIC NIGHTS I	*DARK ANGEL	*SEDUCTION OF LANA SHORE
HOT LIPS	PLAYGIRL	SHE'S A BOY TOY
CHINA CAT	GARAGE GIRLS	*ROUGH DRAFT
IN SEARCH OF THE GOLDEN BONE	WORLD ACCORDING TO GINGER	*BLUE ECSTASY IN NEW YORK
EVERY WOMAN HAS A FANTASY	CORPORATE ASSETS	*WOMAN IN LOVE
*THE MISTRESS	DEVIL IN MISS JONES IV	*EASY
1001 EROTIC NIGHTS II	*THE VIRGIN AND THE LOVER	*PLAY ME AGAIN VANESSA
FOR RICHER FOR POORER	ULTIMATE LOVER	AUNT PEG'S FULFILLMENT
BLONDE FIRE	GETTING PERSONAL	THE ADULTRESS
CAREFUL, HE MAY BE WATCHING	SEX-A-VISION	CRAZY WITH THE HEAT
KINKY BUSINESS	*EROTIC CITY	GRIND
EVERY WOMAN HAS A FANTASY II	[redacted]	*STRANGE BEDFELLOWS
PERFECT PARTNERS	*BEYOND DESIRE	*SEDUCTION OF LANA SHORE

*PREMIERING THIS MONTH
PROGRAMMING SUBJECT TO CHANGE

By popular demand, we're extending our XXX programming hours. Our "in the clear" portion (6pm to 10pm ET) will scramble earlier as we experiment with exciting new ways to give you more of what you want. Look for an exceptional line-up of extra movies, extra specials and plenty of up-to-the-minute surprises! So check us out every night — you never know what tantalizing treats will show up!

EXTRA ENTERTAINMENT AT EARLIER HOURS
AMERICAN EXXXTASY DELIVERS!

PREMIERE

ANGEL GETS EVEN (1987) Angel Kelly discovers her husband s indiscretions in this steamy tale of one woman's revenge. Starring Tom Byron, Tracy Adams. Sept. 3, 18, 30.

ARMY BRAT (1987) More adventures of the Brat with Jamie Summers taking on the barracks in this unabashed spoof of Private Benjamin. Starring Tom Byron, Gail Force. Aug. 27, Sept. 13.

BABY FACE II (1987) A bachelorette party transforms into a sensuous free-for-all when a male stripper casts a spell on the eager party-goers. Starring Candie Evens, Tom Byron, Lois Ayres, Dick Rambone. Aug. 20, 31.

BITCHES OF WESTWOOD (1987) A tempting trio of mystical beauties conjure up the devil. Starring Krista Lane, John Leslie. Sept. 24.

THE BOSS (1986) Angel Kelley stars as an equal opportunity employer who specializes in corporate affairs. Starring Krista Lane, Mike Horner. July 31, Aug. 13, 28, Sept. 8.

CHARLI (1981) Fantasy fuses with reality when a couple decides to spice up their life. Starring Jessie St. James, Billy Dee. Sept. 9, 25.

DAUGHTERS OF EMMAUNUELLE (1983) Enticing tales of the princess of porn. Starring Ron Jeremy, Rhonda Jo Petty. Sept. 23.

DEBBIE DUZ DISHES II: BLAZING MATTRESSES (1986) The trilogy continues as Nina Hartley entertains an onslaught of eager visitors while a wrecking ball threatens to demolish her house. Starring Lois Ayres, Jerry Butler. Aug. 26, Sept. 17.

DEBBIE DUZ DISHES III (1987) A newly widowed Debbie seeks justice in this wildly whimsical conclusion to the Dish trilogy. Starring Nina Hartley, Richard Pacheco. Sept. 17, 28.

DEEP THROAT II (1987) Krista Lane stars as a politician's wife who declares all-out war on pornography in this long-awaited sequel to the most famous adult film ever made. Starring Sheena Horne, Jamie Gillis. Aug. 13, 28, Sept. 14.

DIRTY HARRIET (1987) Undercover cops go to great lengths in this sensuous action thriller. Starring Candie Evens, Cara Lott, Peter North. July 16, 28, Aug. 15, Sept. 7, 25.

GINGER SNAPS (1988) Superstar Ginger Lynn breaks into legit movies but her boyfriend arrives with down and dirty film footage that could hurt her career. Starring Nina Hartley, Tom Byron. July 9, 20, 31, Aug. 16, 21, Sept. 30.

MOVIES

GIRLS ON FIRE (1984) Sophisticated romp involving a gangster's wife, two insurance agents and an erotic fashion show. Aug. 6, 18, 26, Sept. 29.

HANNAH DOES HER SISTERS (1986) Sibling rivalry heats up this tantalizing collection of family affairs. Starring Barbara Dare, Pete: North. Sept. 10, 21.

HIGH SCHOOL MEMORIES (1981) An arousing reunion of high school jocks and eager cheerleaders. Starring Jamie Gillis, Annette Haven. Sept. 2, 14, 27.

LET'S GET IT ON (1986) Scorching series of all-star vignettes. Starring Amber Lynn, John Leslie, Shana McCullough, Tom Byron. Sept. 16, 29.

LIPPS AND MCCAINE (1980) A romantic round up of heroic cowboys, sexy barmaids and gambling rogues. Starring Paul Thomas, Amber Hunt. Aug. 27, Sept. 18.

LOOKING FOR MR. GOOD SEX (1985) JoAnna Storm and Taija Rae join forces as magazine publishers in search of the perfect mate. Starring John Holmes, Amber Lynn. July 30, Aug. 11, 27, Sept. 26.

MADE IN GERMANY (1987) The arrival of a sultry private tutor wreaks havoc in the lives of a wealthy suburban family. Starring Angela Baron, Mike Horner, Tracy Adams. Aug. 12, 30, Sept. 18.

MEMOIRS OF A CHAMBERMAID (1987) Romance novelist finds inspiration from an antique diary in this touching and hauntingly sentimental fantasy. Starring Krista Lane, Brandon. Aug. 19, 29, Sept. 3, 27.

NEVER SO DEEP (1982) Director Gerard Damiano takes a cinematic tour of San Francisco in this sensual yarn of a private eye in search of the girl with the butterfly tattoo. Starring Lomi Sanders, Paul Thomas. July 6, 23, Aug. 14, Sept. 1, 25.

PRETTY PEACHES II (1987) Desperate parents cannot control their daughter's wanton ways. Starring Tracy Adams, Peter North. July 15, Aug. 18, 31, Sept. 10.

SEX BOAT (1981) Rollicking romance on the high seas when two male stowaways cause waves aboard an all female cruise. Starring Cody Nicole, Randy West. July 22, Aug. 14, Sept. 15.

WHERE THERE'S SMOKE, THERE'S FIRE (1987) Angela Baron headlines as an ace reporter who follows any lead. Mike Horner is the jealous husband who suspects sloppy journalism. Starring Angel Kelly, Joey Silvera. July 2, 17, 29, Sept. 14.

JULY

		10 PM (ET)	11:30 PM
	FRI 1	*LOOKING FOR MR. GOODSEX	MOUTHWATERING
SIZZLING SATURDAY	SAT 2	*WHERE THERE'S SMOKE	BLONDE FIRE
	SUN 3	IN SEARCH OF THE GOLDEN BONE	TICKLED PINK
	MON 4	TOWER OF POWER	EROTIC CITY
	TUE 5	CORPORATE ASSETS	CHARMED FORCES
	WED 6	DEEP INSIDE TRADING	PLAY ME AGAIN, VANESSA
	THUR 7	DEAR FANNY	AUNT PEG'S FULFILLMENT
	FRI 8	*NEVER SO DEEP	PINK 'N PRETTY
GINGER'S BACK	SAT 9	*GINGER SNAPS	WORLD ACCORDING TO GINGER
	SUN 10	GREAT SEXPECTATIONS	PERFECT PARTNERS
	MON 11	PEEPING TOM	SOUNDS OF SEX
	TUE 12	COFFEE, TEA, OR ME	MATING SEASON
	WED 13	NASTY LADY	LUSTFUL FEELINGS
	THUR 14	WORKING GIRLS	DIRTY DREAMS
	FRI 15	*PRETTY PEACHES II	TICKLED PINK
	SAT 16	*DIRTY HARRIET	BEYOND DESIRE
	SUN 17	HEIDI A.	*WHERE THERE'S SMOKE
	MON 18	FASCINATION	SEX-A-VISION
	TUE 19	DARK ANGEL	KINKY BUSINESS
	WED 20	TOO HOT TO TOUCH	PLEASE DON'T STOP
	THUR 21	HOT LIPS	DIRTY DREAMS
	FRI 22	*SEX BOAT	ROUGHDRAFT
	SAT 23	*THE BOSS	CHINA CAT
	SUN 24	BLUE ECSTASY IN NEW YORK	MOUTHWATERING
	MON 25	CHARMED FORCES	IN SEARCH OF THE GOLDEN BONE
	TUE 26	PROJECT GINGER	THE MISTRESS
	WED 27	ULTIMATE LOVER	FOR RICHER, FOR POORER
	THUR 28	WOMAN IN LOVE	STRANGE BEDFELLOWS
	FRI 29	EASY	PRIVATE MOMENTS
	SAT 30	EVERY WOMAN HAS A FANTASY	THE ADULTRESS
	SUN 31	EVERY WOMAN HAS A FANTASY II	*GINGER SNAPS

...continued

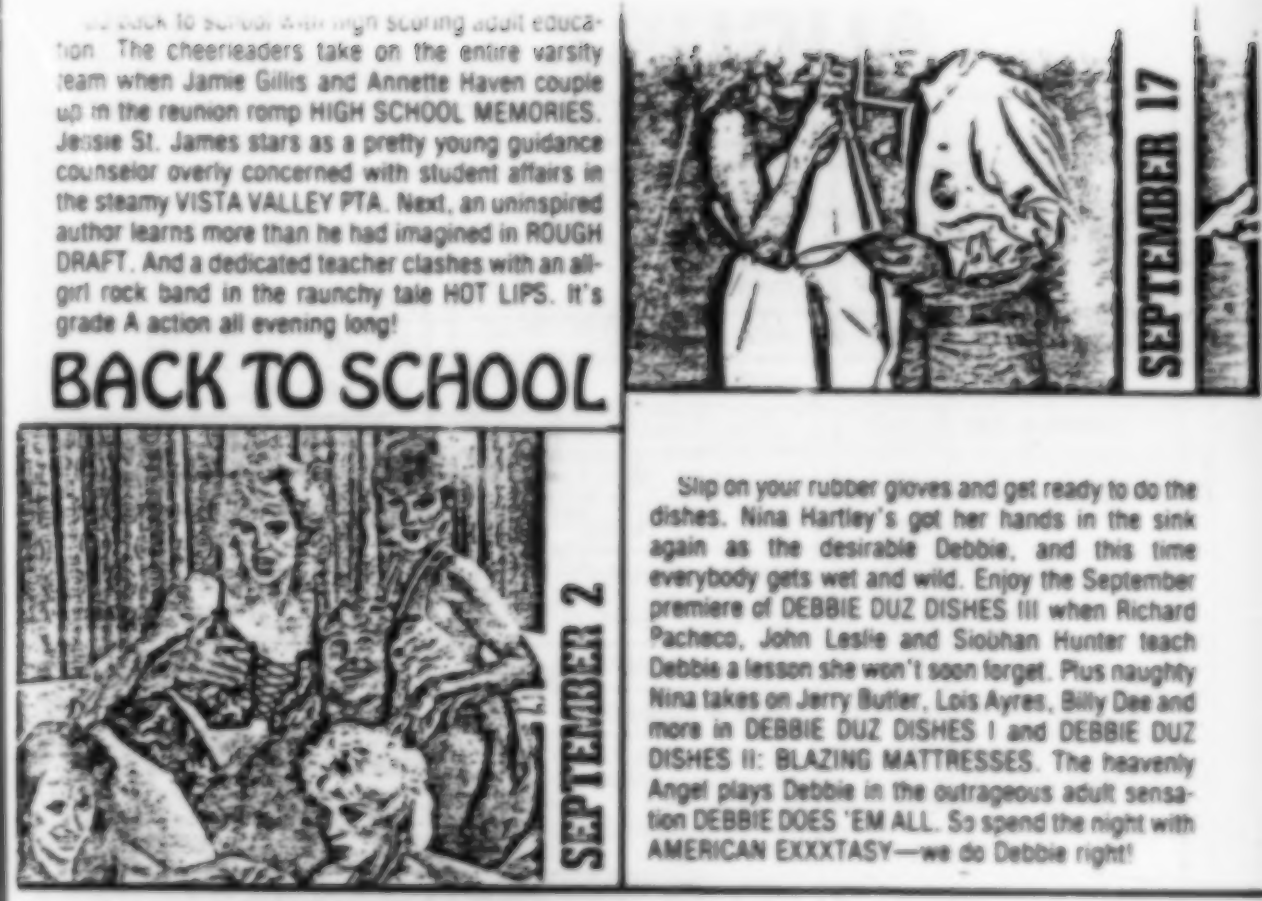
Exxxtasy PLUS! A different Don't miss American XXX movie every night at 7PM (Eastern time).

1 AM	2:30 AM	4:00 AM
PEEPING TOM	GREAT SEXPECTATIONS	*LOOKING FOR MR. GOODSEX
CRAZY WITH THE HEAT	TOO HOT TO TOUCH	*WHERE THERE'S SMOKE
SEXCAPADES	EASY	IN SEARCH OF THE GOLDEN BONE
V—THE HOT ONE	THE MISTRESS	TOWER OF POWER
DEVIL IN MISS JONES III	FASCINATION	CORPORATE ASSETS
3:AM	HARLEM CANDY	DEEP INSIDE TRADING
THE VIRGIN AND THE LOVER	THE PASSION WITHIN	DEAR FANNY
ULTIMATE LOVER	MIAMI SPICE	*NEVER SO DEEP
THE GINGER EFFECT	CLUB GINGER	*GINGER SNAPS
FOR RICHER, FOR POORER	ERUPTION!	GREAT SEXPECTATIONS
THE ADULTRESS	ODDEST COUPLE	PEEPING TOM
PRIVATE MOMENTS	LILITH UNLEASHED	COFFEE, TEA, OR ME
STRANGE BEDFELLOWS	WOMAN IN LOVE	NASTY LADY
SEDUCTION OF LANA SHORE	*LOOKING FOR MR. GOODSEX	WORKING GIRLS
DEVIL IN MISS JONES IV	VISTA VALLEY PTA	*PRETTY PEACHES II
[redacted]	FORBIDDEN BODIES	*DIRTY HARRIET
1001 EROTIC NIGHTS	PLAY ME AGAIN, VANESSA	HEIDI A.
1001 EROTIC NIGHTS II	SOAKING WET	FASCINATION
DEEP INSIDE TRADING	DEBBIE DOES 'EM ALL	DARK ANGEL
PINK 'N PRETTY	*GINGER SNAPS	TOO HOT TO TOUCH
EROTIC CITY	TOWER OF POWER	HOT LIPS
I WANT TO BE BAD	CORPORATE ASSETS	*SEX BOAT
MIAMI SPICE	*NEVER SO DEEP	*THE BOSS
3:AM	TICKLED PINK	BLUE ECSTASY IN NEW YORK
HARLEM CANDY	LILITH UNLEASHED	CHARMED FORCES
THE PASSION WITHIN	CLUB GINGER	PROJECT GINGER
SOUNDS OF SEX	WORKING GIRLS	ULTIMATE LOVER
ODDEST COUPLE	*DIRTY HARRIET	WOMAN IN LOVE
ERUPTION!	*WHERE THERE'S SMOKE	EASY
*LOOKING FOR MR. GOODSEX	PINK 'N PRETTY	EVERY WOMAN HAS A FANTASY
HOT LIPS	*THE BOSS	EVERY WOMAN HAS A FANTASY II

*PREMIERING THIS MONTH
PROGRAMMING SUBJECT TO CHANGE

SUMMER IN HEAT
KP
Here's your invitation
to bathe in the heat of our sizzling selection. The temperature rises when Jamie Summers causes military mischief in ARMY BRAT. Taija Rae feels the heat in the sweet and sweaty MOUTHWATERING. Next, find out why GENTLEMEN PREFER GINGER starring the summer lovin' Ginger Lynn. And passion reaches a feverous pitch when Joanna Storm goes CRAZY WITH THE HEAT. The heat is on!
AUGUST 5

GINGER'S BACK!
An all-night celebration of Ginger Lynn! The action starts with the EXXXTASY Premiere of GINGER SNAPS. Ginger's gone legit but her ex-beau's got the dirt in this wild new film co-starring Tom Byron and Nina Hartley. Enjoy second helpings in THE WORLD ACCORDING TO GINGER, a spicy romp through history featuring Amber Lynn and Francois Papillon. Then feel the GINGER EFFECT when a series of sensuous spirits inhabit the bodies of Cara Lott and Jerry Butler. And come on over to CLUB GINGER where the tempting Ms. Lynn takes centerstage. She's hot, dreamy and forever Ginger!


...back to school. A-plus high scoring adult education. The cheerleaders take on the entire varsity team when Jamie Gillis and Annette Haven couple up in the reunion romp HIGH SCHOOL MEMORIES. Jessie St. James stars as a pretty young guidance counselor overly concerned with student affairs in the steamy VISTA VALLEY PTA. Next, an uninspired author learns more than he had imagined in ROUGH DRAFT. And a dedicated teacher clashes with an all-girl rock band in the raunchy tale HOT LIPS. It's grade A action all evening long!
BACK TO SCHOOL
SEPTEMBER 2
SEPTEMBER 17
Slip on your rubber gloves and get ready to do the dishes. Nina Hartley's got her hands in the sink again as the desirable Debbie, and this time everybody gets wet and wild. Enjoy the September premiere of DEBBIE DUZ DISHES III when Richard Pacheco, John Leslie and Siobhan Hunter teach Debbie a lesson she won't soon forget. Plus naughty Nina takes on Jerry Butler, Lois Ayres, Billy Dee and more in DEBBIE DUZ DISHES I and DEBBIE DUZ DISHES II: BLAZING MATTRESSES. The heavenly Angel plays Debbie in the outrageous adult sensation DEBBIE DOES 'EM ALL. So spend the night with AMERICAN EXXXTASY—we do Debbie right!

SINF
SATI
Get down and dirty and give the devil his due! It's a firey evening of hellish hits starting with the premiere of BITCHES OF WESTWOOD. When Krista Lane conjures up the devil in the form of John Leslie, there's hell to pay! Plus Jamie Gillis is haunted by some very sensuous spirits in the chilling DARK ANGEL. And meet the most maniacal duo in film history with the downright raunchy DEVIL IN MISS JONES PARTS III and IV starring Lois Ayres and Vanessa Del Rio. The devil made us do it!
SEPTEMBER 24

AUGUST

		10 PM (ET)	11:30 PM
	MON 1	SATISFIERS OF ALPHA BLUE	HEIDI A
	TUE 2	THAT'S OUTRAGEOUS	DIRTY DREAMS
	WED 3	GRIND	CHINA CAT
	THUR 4	VISTA VALLEY PTA	PLAY ME AL-'N. VANESSA
	FRI 5	*ARMY BRAT	MOUTHWATERING
SUMMER IN HEAT	SAT 6	*GIRLS ON FIRE	EROTIC CITY
	SUN 7	V—THE HOT ONE	BEYOND DESIRE
	MON 8	DEBBIE DOES 'EM ALL	THE ODDEST COUPLE
	TUE 9	PERFECT PARTNERS	SOUNDS OF SEX
	WED 10	PLEASE DON'T STOP	WORKING GIRLS
	THUR 11	LOOKING FOR MR. GOODSEX	IN SEARCH OF THE GOLDEN BONE
	FRI 12	*MADE IN GERMANY	ERUPTION
	SAT 13	*DEEP THROAT II	THE MISTRESS
	SUN 14	NEVER SO DEEP	HARLEM CANDY
	MON 15	DIRTY HARRIET	DEEP INSIDE TRADING
	TUE 16	GINGER SNAPS	ROUGH DRAFT
	WED 17	THE BOSS	I WANT TO BE BAD
	THUR 18	PRETTY PEACHES II	*GIRLS ON FIRE
	FRI 19	*MEMOIRS OF A CHAMBERMAID	LUSTFUL FEELINGS
"PRETTY SPECIAL"	SAT 20	*BABY FACE II	DOLL FACE
	SUN 21	THE PASSION WITHIN	TOWER OF POWER
	MON 22	3:AM	THE ADULTRESS
	TUE 23	EASY	MATING SEASON
	WED 24	FORBIDDEN BODIES	COFFEE, TEA OR ME
	THUR 25	MIAMI SPICE	ULTIMATE LOVER
	FRI 26	*DEBBIE DUZ DISHES II	CORPORATE ASSETS
	SAT 27	*LIPPS AND MCCAINE	LOOKING FOR MR. GOODSEX
	SUN 28	*DEEP THROAT II	BLUE ECSTASY IN NY
	MON 29	*MEMOIRS OF A CHAMBERMAID	NEVER SLEEP ALONE
	TUE 30	*MADE IN GERMANY	THE VIRGIN & THE LOVER
	WED 31	PINK & PRETTY	DEBBIE DOES 'EM ALL

XXXTRA!
Don't miss American Exxxtasy PLUS! A different XXX movie every night at 7PM (Eastern time).

1 AM	2:30 AM	4:00 AM
PROJECT GINGER	DOLL FACE	SATISFIERS OF ALPHA BLUE
WORLD ACCORDING TO GINGER	EASY	THAT'S OUTRAGEOUS
THE GINGER EFFECT	TOO HOT TO TOUCH	GRIND
CLUB GINGER	3:AM	VISTA VALLEY PTA
GENTLEMEN PREFER GINGER	CRAZY WITH THE HEAT	*ARMY BRAT
BLAME IT ON GINGER	CHARMED FORCES	*GIRLS ON FIRE
MIAMI SPICE	CORPORATE ASSETS	V—THE HOT ONE
LILITH UNLEASHED	THE PASSION WITHIN	DEBBIE DOES 'EM ALL
FOR RICHER, FOR POORER	KINKY BUSINESS	PERFECT PARTNERS
ULTIMATE LOVER	TOWER OF POWER	PLEASE DON'T STOP
EROTIC CITY	THE VIRGIN AND THE LOVER	LOOKING FOR MR. GOODSEX
[illegible]	EVERY WOMAN HAS A FANTASY	*MADE IN GERMANY
COFFEE, TEA OR ME	THE BOSS	*DEEP THROAT II
PINK 'N PRETTY	SEX BOAT	NEVER SO DEEP
DEVIL IN MISS JONES I	WOMEN IN LOVE	DIRTY HARRIET
DEVIL IN MISS JONES II	HOT LIPS	GINGER SNAPS
DEVIL IN MISS JONES III	PRIVATE MOMENTS	THE BOSS
DEVIL IN MISS JONES IV	MATING SEASON	PRETTY PEACHES II
THE MISTRESS	EVERY WOMAN HAS A FANTASY	*MEMOIRS OF A CHAMBERMAID
SEX-A-VISION	DEBBIE DOES 'EM ALL	*BABY FACE II
GINGER SNAPS	IN SEARCH OF THE GOLDEN BONE	THE PASSION WITHIN
SEDUCTION OF LANA SHORE	CRAZY WITH THE HEAT	3:AM
DEAR FANNY	EROTIC CITY	EASY
DARK ANGEL	FOR RICHER FOR POORER	FORBIDDEN BODIES
V—THE HOT ONE	BEYOND DESIRE	MIAMI SPICE
SATISFIERS OF ALPHA BLUE	*GIRLS ON FIRE	*DEBBIE DUZ DISHES II
CHINA CAT	*ARMY BRAT	*LIPPS AND MCCAINE
VISTA VALLEY PTA	THE BOSS	*DEEP THROAT II
GRIND	ERUPTION	*MEMOIRS OF A CHAMBERMAID
COFFEE, TEA OR ME	SEX-A-VISION	*MADE IN GERMANY
*BABY FACE II	PRETTY PEACHES II	PINK & PRETTY

*PREMIERING THIS MONTH
PROGRAMMING SUBJECT TO CHANGE

SEPTEMBER

		10 PM (ET)	– 11:30 PM
	THUR 1	WORKING GIRLS	HARLEM CANDY
BACK TO SCHOOL	FRI 2	*HIGH SCHOOL MEMORIES	VISTA VALLEY PTA
	SAT 3	*ANGEL GETS EVEN	WOMAN IN LOVE
	SUN 4	V—THE HOT ONE	1001 EROTIC NIGHTS I
	MON 5	IN SEARCH OF THE GOLDEN BONE	DEVIL IN MISS JONES I
	TUE 6	GINGER SNAPS	DEEP INSIDE TRADING
	WED 7	TOWER OF POWER	DIRTY HARRIET
	THUR 8	THE PASSION WITHIN	THE BOSS
	FRI 9	*CHARLI	I WANT TO BE BAD
	SAT 10	*HANNA DOES HER SISTERS	PRETTY PEACHES II
	SUN 11	CRAZY WITH THE HEAT	SEX-A-VISION
	MON 12	SEDUCTION OF LANA SHORE	DEVIL IN MISS JONES II
	TUE 13	THE ADULTRESS	GRIND
	WED 14	3:AM	*HIGH SCHOOL MEMORIES
	THUR 15	EROTIC CITY	SEX BOAT
A NIGHT WITH AMBER	FRI 16	*LET'S GET IT ON	ULTIMATE LOVER
LET'S DO DEBBIE	SAT 17	*DEBBIE DUZ DISHES III	DEBBIE DUZ DISHES II
	SUN 18	*ANGEL GETS EVEN	MADE IN GERMANY
	MON 19	SEX ASYLUM II	HOT LIPS
	TUE 20	MATING SEASON	TOO HOT TO TOUCH
	WED 21	EASY	PINK 'N PRETTY
	THUR 22	FOR RICHER, FOR POORER	CORPORATE ASSETS
	FRI 23	*DAUGHTERS OF EMMANUEL	HEIDI A.
SINFUL SATURDAY	SAT 24	*BITCHES OF WESTWOOD	DEVIL IN MISS JONES III
	SUN 25	COFFEE, TEA OR ME	NEVER SO DEEP
	MON 26	FORBIDDEN BODIES	LOOKING FOR MR. GOODSEX
	TUE 27	MIAMI SPICE	BEYOND DESIRE
	WED 28	CHINA CAT	*DEBBIE DUZ DISHES III
	THUR 29	GIRLS ON FIRE	TRINITY BROWN
	FRI 30	THAT'S OUTRAGEOUS	NASTY LADY

HANNA!
Don't miss American Exxxtasy PLUS! A different XXX movie every night at 7PM (Eastern time).

1 AM	2:30 AM	4:00 AM
NEVER SO DEEP	MOUTHWATERING	WORKING GIRLS
ROUGH DRAFT	HOT LIPS	*HIGH SCHOOL MEMORIES
MEMOIRS OF A CHAMBERMAID	EASY	ANGEL GETS EVEN
1001 EROTIC NIGHTS II	TRINITY BROWN	V—THE HOT ONE
CORPORATE ASSETS	NASTY LADY	IN SEARCH OF THE GOLDEN BONE
DOLL FACE	THE MISTRESS	GINGER SNAPS
BLUE ECSTASY IN NEW YORK	NEVER SLEEP ALONE	TOWER OF POWER
KINKY BUSINESS	THE VIRGIN AND THE LOVER	THE PASSION WITHIN
SATISFIERS OF ALPHA BLUE	DIRTY DREAMS	*CHARLI
PLAY ME AGAIN, VANESSA	COFFEE, TEA OR ME	*HANNA DOES HER SISTERS
BRAT ON THE RUN	WORKING GIRLS	CRAZY WITH THE HEAT
HARLEM CANDY	SHOWDOWN	SEDUCTION OF LANA SHORE
ARMY BRAT	CHARMED FORCES	THE ADULTRESS
DEEP THROAT II	WHERE THERE'S SMOKE	3:AM
CHINA CAT	ERUPTION	EROTIC CITY
MIAMI SPICE	PLEASE DON'T STOP	*LET'S GET IT ON
DEBBIE DUZ DISHES I	DEBBIE DOES 'EM ALL	DEBBIE DUZ DISHES III
LIPPS & MCCAINE	DEAR FANNY	*ANGEL GETS EVEN
TOWER OF POWER	WOMAN IN LOVE	SEX ASYLUM II
EVERY WOMAN HAS A FANTASY I	KINKY BUSINESS	MATING SEASON
MOUTHWATERING	*HANNA DOES HER SISTERS	EASY
SOUNDS OF SEX	EVERY WOMAN HAS A FANTASY II	FOR RICHER, FOR POORER
DEEP INSIDE TRADING	DOLL FACE	*DAUGHTERS OF EMMANUEL
DARK ANGEL	DEVIL IN MISS JONES IV	*BITCHES OF WESTWOOD
DIRTY HARRIET	*CHARLI	COFFEE, TEA OR ME
PERFECT PARTNERS	3:AM	FORBIDDEN BODIES
MEMOIRS OF A CHAMBERMAID	*HIGH SCHOOL MEMORIES	MIAMI SPICE
THE PASSION WITHIN	ULTIMATE LOVER	CHINA CAT
DIRTY DREAMS	*LET'S GET IT ON	GIRLS ON FIRE
GINGER SNAPS	*ANGEL GETS EVEN	THAT'S OUTRAGEOUS

*PREMIERING THIS MONTH
PROGRAMMING SUBJECT TO CHANGE

THE HITS KEEP COMING!

Look ahead to the months to come for an exceptional line-up of EXXXTASY exclusives! We're packing the schedule with the hottest, newest releases featuring the most enticing and sensual stars.

THE SEXIEST STARS IN THE STEAMIEST SCENES— ENJOY PRIVATE SCREENINGS OF EXXXTASY EXCLUSIVES!

John Leslie takes his turn behind the camera in two of the year's most acclaimed erotic hits. Fevers are rising for those naughty NIGHTSHIFT NURSES starring Lois Ayres and Siobhan Hunter as hospital honies who are serious about playing doctor. Next, Leslie serves up a scintillating murder mystery worthy of Perry Mason with the titillating twists and turns of GOIN' DOWN SLOW. Alicia Monet, Ona Z., Robert Bullock, Richard Pacheco and Tom Byron head an all-star cast in the hottest whodunit to hit the screen!

And look for the forbidden adventures of literature's most erotic couple, BEAUTY AND THE BEAST. Tracy Adams, Nikki Knights, Mike Horner and Jerry Butler star in this outrageous reworking of the classic tale.

212-696-4111 or 1-800-334-3454

ENCLOSURE B

PROGRAM OF HARD-CORE PORNOGRAPHIC MOTION PICTURE FILMS EXHIBITED NATION-WIDE BY HOME DISH ONLY SATELLITE NETWORKS, INC., A NEW YORK CORPORATION, ON ITS TUXEDO NETWORK SERVICE ON SATELLITE STATION G-2 CHANNEL 10, DURING THE PERIOD FROM JANUARY 1, 1988 THROUGH JULY 31, 1988.

(Reference: Amicus Curiae Brief at pages 5, 14, 16, 17, 40, 41, 44-45)

TUXEDO NETWORK

JANUARY 1988

3 **Behind The Scenes** Sexcapades Great Sexpectations Careful, He May Be Watching Matinee Idol	4 **Murder On Monday** Trinity Brown 3 AM Midnight Heat Good Girl/Bad Girl	5 **Tuxxedo Blues** [redacted] If My Mother Only Knew *The Virgin & The Lover Devil In Miss Jones III	6 **Superstar Tish Ambrose** Corporate Assets Lilith Unleashed Tickled Pink Naked Scents
10 **Supergirl Sunday** Supergirls Do The Navy Blame It On Ginger Supergirls Do General Hospital Heart Throbs	11 **Hollywood Rip-Off Night** Lust On The Orient Express Beverly Hills Cox *Kinky Business Oddest Couple	12 **I'll Take Manhattan** Blue Ecstasy In New York Sex Crimes 2084 Midnight Heat The Mistress	13 **Taboo Night I** Taboo American Style Taboo American Style Ribald Tales of Canterbu Voyeur
17 **Sinful Sunday** 3 AM *Vista Valley PTA Devil In Miss Jones III *Showdown	18 **Henri Pachard Night** Great Sexpectations Lilith Unleashed The Oddes Couple The Adultress	19 **She Loves You** Mouthwatering *I Want To Be Bad Blame It On Ginger Supergirls Do The Navy	20 **Wild Wednesday** Good Girl/Bad Girl Sexcapades Forbidden Bodies *Never Sleep Alone
24 **The Roaring 20's** Pink Champagne Lust On The Orient Express Trashy Lady Sex Crimes 2084	25 **I Saw What You Did** Nothing To Hide Voyeur Peeping Tom That's Outrageous	26 **Flying High** Up, Up & Away Supergirls Do The Navy Coffee, Tea Or Me 3 AM	27 **Husbands & Wives** For Richer, For Poorer The Adultress Tickled Pink Blame It On Ginger
31 **Split Personalities** Y--The Hot One Careful, He May Be Watching Erotic City Midnight Heat			

MOVIE TIMES:

(1) 7PM / 1AM EST
(2) 8:30PM / 2:30 AM EST
(3) 10PM / 4AM EST
(4) 11:30PM EST

	1 **Bedtime Stories** *Never Sleep Alone Erotic City *Debbie Duz Dishes I Voyeur	2 **Your Cheatin' Heart** *The Adultress Blame It On Ginger *I Want To Be Bad For Richer, For Poorer
7 **Hi-Tech Sex** Satisfiers of Alpha Blue Sex Crimes 2084 Ultimate Lover Nasty	8 **Phys Ed Friday** *Vista Valley PTA Mouthwatering *Kinky Business Easy	9 **Ladies of the Evening** *Showdown Pussycat Galore Forbidden Bodies Getting Personal
14 **Taboo Night II** Taboo American Style III Taboo American Style IV Sexcapades Careful, He May Be Watching	15 **Romance Friday** *Passion Within *Virgin & The Lover Pink Champagne Ultimate Lover	16 **Romance Saturday** Nothing To Hide Matinee Idol That's Gorgeous Tickled Pink
21 **Funny Business** Kinky Business Corporate Assets Up, Up & Away Supergirls Do General Hospital	22 **Fantasy Friday** [redacted] Fantasy Flesh & Fantasy Play Me Again, Vanessa Eruption	23 **Love, Law & Order** Beverly Hills Cox Playpen Trinity Brown Expose Me Now
28 **Open All Night** Ribald Tales of Canterbury Showdown Never Sleep Alone Vista Valley PTA	29 **The Devil Made Me Do It** Devil In Miss Jones III Lilith Unleashed Devil In Miss Jones IV Beyond Desire	30 **Suburban Saturday** *Debbie Duz Dishes I Oddest Couple Blame It On Ginger Easy

February 1988

TUXEDO NETWORK

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
	1 PHYS. ED MONDAY Flesh and Fantasy Play Me Again, Vanessa Nothing To Hide Easy	**2** SUPERSTAR: SHERI ST. CLAIRE Corporate Assets Sex Crimes 2084 Voyeur The Adultress	**3** HOLLYWOOD NIGHT Matinee Idol Beverly Hills Cox Sexcapades Virgin & The Lover	**4** FAMILY AFFAIRS If My Mother Only Knew 3:AM Vista Valley P.T.A. Taboo American Style I	WILD WINTER WEEKEND **5** *Sex-A-Vision Kinky Business [redacted] The Mistress	**6** *The Boss Tickled Pink *An Unnatural Act I Blame It On Ginger
7 CRITICS CHOICE Ultimate Lover For Richer, For Poorer Forbidden Bodies Nothing To Hide	**8** ONE STEP BEYOND Devil in Miss Jones III Dark Angel Lilith Unleashed Devil in Miss Jones IV	**9** BRAT PACK *Brat On The Run Good Girl/Bad Girl I Want To Be Bad Trashy Lady	**10** TIME WARP WEDNESDAY Throat: 12 Years After Getting Personal Satisfiers of Alpha Blue Sex Crimes: 2084	**11** ALL NEW! HUSBANDS AND WIVES Eruption Passion Within The Adultress *An Unnatural Act I	VALENTINE WEEKEND **12** *Lusiful Feelings Beyond Desire Tasty Naked Scents	**13** *Woman in Love Pink Champagne *Brat on the Run Heart Throbs
14 AWARD WINNING FILMS Taboo American Style I Devil in Miss Jones III Devil in Miss Jones IV Oddest Couple	**15** MAYHEM ON MONDAY Careful, He May Be Watching Matinee Idol *Sex-A-Vision Play Me Again, Vanessa	**16** SUPERSTAR: JOHN LESLIE Lust On the Orient Express Trinity Brown The Passion Within Beyond Desire	**17** ALL NEW! FUNNY BUSINESS *The Boss Erotic City Heart Throbs I Want To Be Bad	**18** STREET HEAT Midnight Heat Beyond Desire *Lustful Feelings Voyeur	PREMIERE CELEBRATION **19** * Never So Deep Easy Blame It On Ginger Taboo American Style I	**20** *Making It Big V—The Hot One Throat: 12 Years After Taboo American Style II
21 TUXXEDO'S "SUNDAY BEST" Debbie Duz Dishes I The Passion Within Beverly Hills Cox Vista Valley PTA	**22** LADIES' NIGHT Supergirls Do The Navy *Woman in Love Supergirls Do General Hospital Good Girl/Bad Girl	**23** TWOSOME TUESDAY Oddest Couple Virgin and the Lover The Adultress The Mistress	**24** WILD WEDNESDAY [redacted] Pink Champagne [redacted] *Making It Big	**25** TUXXEDO TOUR NIGHT That's Outrageous! Heart Throbs Beverly Hills Cox Eruption	A WEEKEND AFFAIR **26** Kinky Business Never Sleep Alone Sexcapades Taboo American Style III	**27** Ultimate Lover Pussycat Galore *Lustful Feelings Taboo American Style IV
28 BY POPULAR DEMAND Mouthwatering V—The Hot One *Sex-A-Vision Tasty	**29** THE FILMS OF CHUCK VINCENT Voyeur Playpen Sex Crimes 2084 * Never So Deep					

*February Premiere Movies

SHOW TIMES
1st Movie: 7 PM, 1 AM
2nd Movie: 9:30 PM, 2:30 AM
3rd Movie: 10 PM, 4 AM
4th Movie: 11:30 PM
(ALL TIMES EASTERN

TUXEDO NETWORK

MARCH
APRIL
1988

FLYING TUXEDO

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
		1	2 WILD Wednesday	3	4	5
		PEEPING TOM TABOO. AMERICAN STYLE I MATINEE IDOL [redacted]	TICKLED PINK ODDEST COUPLE DEBBIE DUZ DISHES PLAY ME AGAIN. VANESSA	VOYEUR GOOD GIRL/BAD GIRL LUSTFUL FEELINGS THE MISTRESS	*ANGEL GETS EVEN FLESH AND FANTASY AN UNNATURAL ACT I *TALK DIRTY TO ME III	*BLUE ECSTASY IN NEW YORK THE PASSION WITHIN *MADE IN GERMANY UP, UP AND AWAY
6	7	8	9	10	11	12 Superstar NIGHT
TRASHY LADY BEVERLY HILLS COX KINKY BUSINESS BLAME IT ON GINGER	*BODIES IN HEAT EROTIC CITY *MIAMI SPICE SUPERGIRLS DO GENERAL HOSPITAL	THROAT: 12 YEARS AFTER EXPOSE ME NOW THAT'S OUTRAGEOUS GETTING PERSONAL	COFFEE, TEA OR ME? SUPERGIRLS DO THE NAVY SEX CRIMES 2084 UP, UP AND AWAY	EASY *MADE IN GERMANY NOTHING TO HIDE VISTA VALLEY, PTA	*WHERE THERE'S SMOKE THERE'S FIRE DEVIL IN MISS JONES III *BODIES IN HEAT V—THE HOT ONE	*MIAMI SPICE THE MISTRESS *WHEN SHE WAS BAD GOOD GIRL, BAD GIRL
13	14	15	16	17	18	19
TABOO. AMERICAN STYLE I BRAT ON THE RUN TABOO AMERICAN STYLE II TALK DIRTY TO ME III	NEVER SLEEP ALONE 3:AM LUSTFUL FEELINGS THE MISTRESS	*ANGEL GETS EVEN THE ADULTRESS TASTY THE PASSION WITHIN	SATISFIERS OF ALPHA BLUE AN UNNATURAL ACT ULTIMATE LOVER *WHERE THERE'S SMOKE THERE'S FIRE	V—THE HOT ONE *BODIES IN HEAT ERUPTION! DEVIL IN MISS JONES IV	*DEEP INSIDE TRADING PEEPING TOM SUPERGIRLS DO THE NAVY ODDEST COUPLE	NOTHING TO HIDE *DEEP INSIDE TRADING SUPERGIRLS DO GENERAL HOSPITAL TICKLED PINK
20	21 Murder on Monday	22	23	24	25	26
PLAY ME AGAIN. VANESSA *WHEN SHE WAS BAD WOMAN IN LOVE DEVIL IN MISS JONES III	BEVERLY HILLS COX ERUPTION EXPOSE ME NOW *BODIES IN HEAT	*ANGEL GETS EVEN TABOO. AMERICAN STYLE III TABOO. AMERICAN STYLE IV *MADE IN GERMANY	KINKY BUSINESS TRASHY LADY FOR RICHER. FOR POORER THROAT: 12 YEARS AFTER	HEART THROBS THE PASSION WITHIN BEYOND DESIRE PINK CHAMPAGNE	MATINEE IDOL [redacted] TASTY SEX CRIMES 2084	PUSSYCAT GALORE VIRGIN AND THE LOVER BLAME IT ON GINGER PEEPING TOM
27	28	29	30	31		
*MADE IN GERMANY MOUTHWATERING *ANGEL GETS EVEN ULTIMATE LOVER	NOTHING TO HIDE THAT'S OUTRAGEOUS *MIAMI SPICE WHERE THERE'S SMOKE THERE'S FIRE	THE ODDEST COUPLE THE MISTRESS FORBIDDEN BODIES *BODIES IN HEAT	*WHEN SHE WAS BAD LUSTFUL FEELINGS WOMAN IN LOVE *BLUE ECSTASY IN NEW YORK	EXPOSE ME NOW *TALK DIRTY TO ME III THE ADULTRESS NAKED SCENTS		

March comes alive with an enticing collection of first-run films and fun-filled featurettes.

SHOW TIMES!

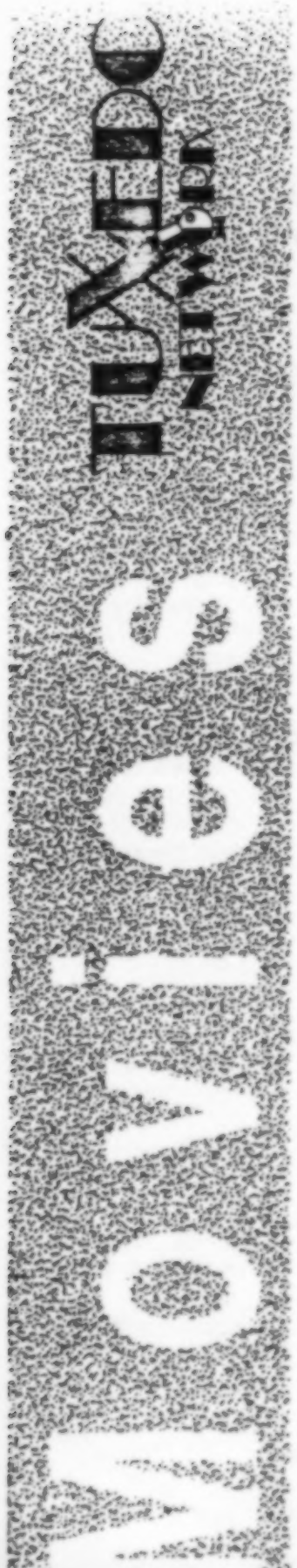
1st Movie: 7 PM, 1 AM
2nd Movie: 8:30 PM, 2:30 AM
3rd Movie: 10 PM, 4 AM
4th Movie: 11:30 PM

(All Times Listed Are Eastern Time)
*Premiere Movies
Times and Titles Subject to Change

TUXEDO TIMES

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
		TUXEDO celebrates Spring with a heartwarming line-up of April premieres. Enjoy private screenings of the hottest adult films—all month long!			1 Weekend UP, UP AND AWAY SUPERGIRLS DO THE NAVY *DEEP INSIDE TRADING	2 MATINEE IDOL *EROTICA THE BOSS TRASHY LADY*
3 TABOO, AMERICAN STYLE I THROAT: 12 YEARS AFTER SEX CRIMES 2084 WOMAN IN LOVE	4 PEEPING TOM EASY MOUTHWATERING EXPOSE ME NOW	5 TICKLED PINK *MADE IN GERMANY VISTA VALLEY PTA FOR RICHER, FOR POORE	6 ODDEST COUPLE *WHERE THERE'S SMOKE THERE'S FIRE 3:AM SUPERGIRLS DO GENERAL HOSPITAL	7 DEBBIE DUZ DISHES DEVIL IN MISS JONES III *MIAMI SPICE NOTHING TO HIDE	8 PLAY ME AGAIN, VANESSA V—THE HOT ONE LILITH UNLEASHED BEYOND DESIRE	9 GOOD GIRL, BAD GIRL *BABY FACE II *WHEN SHE WAS BAD IF MY MOTHER ONLY KNEW
10 LUSTFUL FEELINGS *DEEP INSIDE TRADING ERUPTION GREAT SEXPECTATIONS	11 THE MISTRESS BRAT ON THE RUN SHOWDOWN PUSSYCAT GALORE	12 Superstar Night *EROTICA [redacted] NEVER SLEEP ALONE *ANGEL GETS EVEN	13 FLESH AND FANTASY TASTY ULTIMATE LOVER HEART THROBS	14 Funny Business AN UNNATURAL ACT I THE BOSS THE PASSION WITHIN COFFEE, TEA, OR ME?	15 *TALK DIRTY TO ME III EXPOSE ME NOW NAKED SCENTS SATISFIERS OF ALPHA BLUE	16 *BLUE ECSTASY IN NEW YORK *SWEET ALICE *MIAMI SPICE PINK CHAMPAGNE
17 *MADE IN GERMANY IF MY MOTHER ONLY KNEW, MATINEE IDOL 3:AM	18 UP, UP AND AWAY DEVIL IN MISS JONES IV GOOD GIRL/BAD GIRL *BABY FACE II	19 TRASHY LADY BEYOND DESIRE *V—THE HOT ONE *WHEN SHE WAS BAD	20 KINKY BUSINESS LILITH UNLEASHED GREAT SEXPECTATIONS THROAT: 12 YEARS AFTER	21 BLAME IT ON GINGER MOUTHWATERING WOMAN IN LOVE WHERE THERE'S SMOKE THERE'S FIRE	22 Husbands & Wives *BODIES IN HEAT DEBBIE DUZ DISHES THE MISTRESS *EROTICA	23 EROTIC CITY *GIRLS ON FIRE *DEEP INSIDE TRADING *SEX CRIMES 2084
24 Hollywood Rip-Off Night *MIAMI SPICE FORBIDDEN BODIES FOR RICHER, FOR POORER NAKED SCENTS	25 SUPERGIRLS DO GENERAL HOSPITAL ULTIMATE LOVER NOTHING TO HIDE ODDEST COUPLE	26 THROAT: 12 YEARS AFTI DEVIL IN MISS JONES IV PINK CHAMPAGNE *BLUE ECSTASY IN NEW YORK	27 EXPOSE ME NOW PUSSYCAT GALORE SHOWDOWN PLAY ME AGAIN, VANESSA	28 *SWEET ALICE THAT'S OUTRAGEOUS ERUPTION EASY	29 GETTING PERSONAL PINK CHAMPAGNE THE BOSS *GIRLS ON FIRE	30 COFFEE, TEA, OR ME? *BABY FACE II *EROTICA NEVER SLEEP ALONE

SHOW TIMES!
1st Movie: 7 PM, 1 AM
2nd Movie: 8:30 PM, 2:30 AM
3rd Movie: 10 PM, 4 AM
4th Movie: 11:30 PM
(All Times Listed Are Eastern Time)
*Premiere Movies
Times and Titles Subject to Change



THE ADULTRESS (1988) Starring Krista Lane, Sheri St. Claire. March 15, 31.

***ANGEL GETS EVEN** (1987) Angel Kelly discovers her husband's indiscretions in this steamy tale of one woman's revenge. Starring Tom Byron, Tracy Adams. March 4, 15, 22, 27, April 12.

***BABY FACE II** (1985) All-Star action at an outrageous bachelorette party. Starring Lois Ayres, Jerry Butler. April 9, 18, 30.

BEVERLY HILLS COX (1986) Starring Ginger Lynn, Jamie Gillis. March 6, 21.

BEYOND DESIRE (1986) Starring Seka, John Leslie. March 24, April 8, 19.

BLAME IT ON GINGER (1986) Starring Ginger Lynn, Jamie Gillis. March 6, 26, April 21.

***BLUE ECSTASY IN NEW YORK** (1980) A prudish young lady clashes with her very uninhibited alter ego. Starring Leslie Bovee, Samantha Fox. March 5, 30, April 16, 26.

***BODIES IN HEAT** (1983) Murder and theft in this heated tale of marital mischief. Starring Annette Haven, Hershcel Savage. March 7, 11, 17, 21, 29, April 22.

THE BOSS (1986) Starring Krista Lane, Mike Horner. April 2, 14, 29.

BRAT ON THE RUN (1986) Starring Shana McCullough, Tom Byron. March 13, April 11.

COFFEE, TEA OR ME (1982) Starring Jamie Gillis, Juliet Anderson. March 9, April 14, 30.

DEBBIE DUZ DISHES (1986) Starring Nina Hartley, Jerry Butler. March 2, April 7, 22.

***DEEP INSIDE TRADING** (1988) Ruthless stock market manipulators clash for cash in this seedy tale of yuppies gone bad. TUXEDO exclusive. Starring Krista Lane, Rick Savage. March 18, 19, April 1, 10, 23.

DEVIL IN MISS JONES 3: THE NEW BEGINNING (1986) Starring Lois Ayres, Jack Baker. March 11, 20, April 7.

DEVIL IN MISS JONES 4: THE FINAL OUTRAGE (1986) Starring Lois Ayres, Vanessa Del Rio. March 17, April 18, 26.

EASY (1978) Starring Jessie St. James Desiree Cousteau, Richard Pacheco. March 10, April 4, 28.

EROTIC CITY (1985) Starring Jamie Gillis, Amber Lynn. March 7, April 23.

***EROTICA** (1984) Renowned columnist uncovers the inside scoop at a world famous strip joint. Starring Brigite Lahti. April 2, 12, 22, 30.

ERUPTION (1978) Starring Leslie Bovee, Susan Hart. March 17, 21, April 10, 28.

EXPOSE ME NOW (1983) Starring Danielle Martin, Ron Jeremy. March 8, 21, 31, April 4, 15, 27.

FLESH AND FANTASY (1985) Starring Taija Rae, Ron Jeremy, Sharon Kane. March 4, April 13.

FORBIDDEN BODIES (1986) Starring Tom Byron, Jeanette Littledove, Candie Evens, Krista Lane. March 29, April 24.

FOR RICHER, FOR POORER (1979) Starring Georgina Spelvin, Richard Bolla. March 23, April 5, 24.

GETTING PERSONAL (1985) Starring Colleen Brennan, Herschel Savage. March 8, April 29.

***GIRLS ON FIRE** (1984) Sophisticated romp involving a gangster's wife, two insurance agents and an erotic fashion show. April 23, 29.

GOOD GIRL, BAD GIRL (1984) Starring Colleen Brennan, Joey Silvera. March 3, 12, April 9, 18.

GREAT SEXPECTATIONS (1983) Starring R. Bolla, Sharon Kane. April 10, 20

HEART THROBS (1985) Starring Gina Valentino, Harry Reems. March 24, April 13.

IF MY MOTHER ONLY KNEW (1986) Starring Amber Lynn. April 9, 17.

KINKY BUSINESS (1984) Starring Tom Byron, Ginger Lynn. March 6, 23, April 20.

LILITH UNLEASHED (1985) Starring Tish Ambrose, Paul Thomas. April 8, 20.

LOVE LETTERS (1984) Starring Leslie Bovee, Jamie Gillis. March 3, 14, 30, April 10.

***MADE IN GERMANY** (1987) The arrival of a sultry private tutor wreaks havoc in the lives of a wealthy suburban family. Starring Angela Baron, Mike Horner, Tracy Adams. March 5, 10, 22, 27, April 5, 17.

MATINEE IDOL (1987) Starring Angel, John Leslie. March 1, 25, April 2, 17.

***MIAMI SPICE** (1987) Undercover ladies bust a big-time drug dealer and deliver twice the vice. Starring Amber Lynn, Sheri St. Claire. March 7, 12, 28, April 7, 16, 24.

THE MISTRESS (1982) Starring Kelly Nichols, Richard Pacheco. March 3, 12, 14, 29, April 11, 22.

MOUTHWATERING (1986) Starring Taija Rae, Herschel Savage. March 27, April 4, 21.

NAKED SCENTS (1985) Starring Tish Ambrose. March 31, April 15, 24.

NEVER SLEEP ALONE (1984) Starring John Leslie, Victoria Jackson. March 14, April 12, 30.

NOTHING TO HIDE (1984) Starring John Leslie, Richard Pacheco, Chelsea Machester. March 10, 19, 28, April 7, 25.

THE ODDEST COUPLE (1986) Starring Siobhan Hunter, Danielle, Paul Thomas. March 2, 18, 29, April 6, 25.

THE PASSION WITHIN (1986) Starring Nina Hartley, John Leslie. March 5, 15, 24, April 14.

FEELING 10M (1988) Starring Jerry Butler, Kimberly Carson. March 1, 18, 26, April 4.

PINK CHAMPAGNE (1980) Starring Lisa de Leeuw, Jan Steele. March 24, April 16, 26, 29.

PLAY ME AGAIN, VANESSA (1986) Starring Vanessa Del Rio, Taija Rae. March 2, 20, April 8, 27.

PUSSYCAT GALORE (1984) Starring Danielle, Joey Silvera. March 26, April 11, 27.

SATISFIERS OF ALPHA BLUE (1981) Starring Richard Bolla, Lysa Thatcher. March 16, April 15.

SEX CRIMES 2084 (1985) Starring Sheri St. Claire, Robert Bullock. March 9, 25, April 3, 23.

SHOWDOWN (1986) Starring Sharon Mitchell, Gina Carrera. April 11, 27.

SUPERGIRLS DO GENERAL HOSPITAL (1984) Starring Taija Rae, Raven, Paul Thomas, Joey Silvera, Ginger Lynn. March 7, 19, April 6, 25.

SUPERGIRLS DO THE NAVY (1984) Starring Raven, Paul Thomas, Taija Rae, Susan Nero. March 9, 18, April 1.

[redacted]

***SWEET ALICE** (1983) Lovelorn cowboy takes off to the city in search of his porn star bride. Seka stars. April 16, 28.

TABOO AMERICAN STYLE (PARTS 1 & 2) (1986) A ruthless young woman manipulates her family. Starring Raven, Gloria Leonard, Paul Thomas, Tom Byron. 1: March 1, 13, April 3. 2: March 13.

TABOO AMERICAN STYLE (PARTS 3 & 4) (1986) The saga continues. March 22.

***TALK DIRTY TO ME III** (1984) A sumptuous mermaid learns about life as a land lubber in the sexy spoof of *Splash*. Starring Lisa DeLeuuw, Ginger Lynn, Peter North. March 4, 13, 31, April 15.

TASTY (1986) Starring Hyapatia Lee. March 15, 25, April 13.

THAT'S OUTRAGEOUS! (1983) Starring Jamie Gillis, Frannie Lomay, Joey Silvera, Natasha. March 8, 28, April 28.

3 AM (1978) Starring Georgina Spelvin, Charles Hopper. March 14, April 6, 17.

THROAT: 12 YEARS AFTER (1984) Starring Joanna Storm, Eric Edwards, Jerry Butler, Sharron Kane. March 8, 23, April 3, 20, 26.

TICKLED PINK (1985) Starring Sharon Kane, Joey Silvera. March 2, 19, April 5.

TRASHY LADY (1985) Starring Ginger Lynn, Harry Reems. March 6, 23, April 2, 19.

AN UNNATURAL ACT I (1984) Starring John Leslie, Desiree Lane. March 4, 16, April 14.

ULTIMATE LOVER (1986) Starring Nina Hartley, Eric Edwards, Amber Lynn. March 16, 27, April 13, 25.

UP, UP AND AWAY (1984) Starring Cody Nicole, Ginger Lynn. March 5, 9, April 1, 18.

V—THE HOT ONE (1979) Starring Annette Haven, John Leslie, Paul Thomas. March 11, 17, April 18, 19.

VIRGIN AND THE LOVER (1982) Starring Eric Edwards, Leah Marion. March 26.

VISTA VALLEY P.T.A. (1980) Starring Jessie St. James, John Leslie. March 10, April 5.

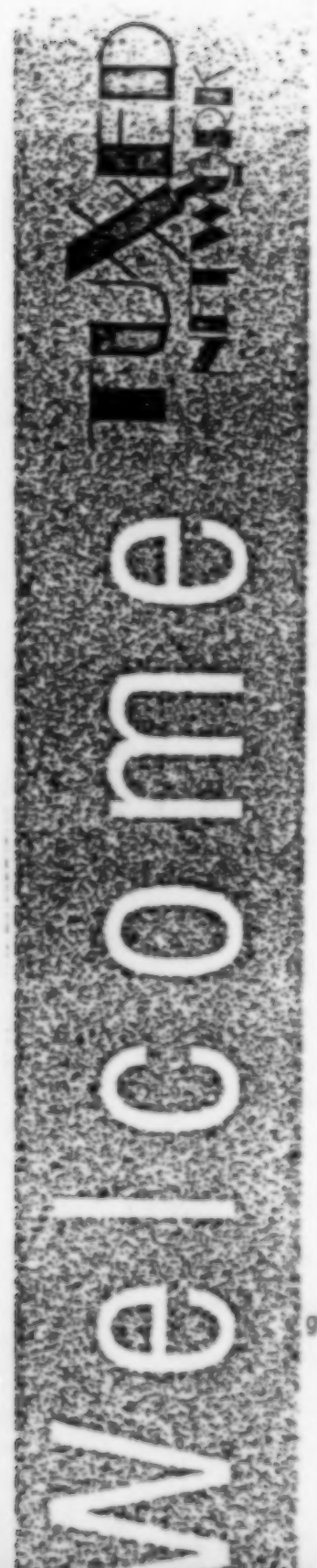
VOYEUR (1985) Starring Sheri St. Claire, Robert Bullock. March 3.

***WHEN SHE WAS BAD** (1983) Bittersweet, seductive tale of a promiscuous couple and their confused daughter. Noted performances by Georgina Spelvin, John Leslie, Chelsea Manchester. March 2, 20, 30, April 9, 19.

***WHERE THERE'S SMOKE, THERE'S FIRE** (1987) Angela Baron headlines as an ace reporter who follows any lead. Mike Horner is the jealous husband who suspects sloppy journalism. Starring Angel Kelly, Joey Silvera. March 11, 16, 28, April 6, 21.

WOMAN IN LOVE (1980) Starring Lorien Dominique, Richard Bolla. March 20, 30, April 3, 21.

TUXEDO
NEWYORK
JUNE
JULY
1988
Exclusive
Cable
Premiere!
Memoirs
of
Molly Mae
Saturday May 6
Sophisticated Movie Channel for Adults



Join **Tuxxedo** for a summer long celebration of romance. From stolen affairs to forbidden fantasies every **Tuxxedo** evening is a midsummer night's dream come true! Escape from the summer sun and bathe in the heat of **Tuxxedo**'s sizzling collection of monthly premieres and exclusive mini-features.

CHRISTINE'S SECRET

♡ **Tuxxedo** breezes into May with the haunting memories of lovers past. Krista Lane stars as a beautiful mystery novelist who finds ghostly inspiration from the **Memoirs of Molly Mae** (An Exclusive Cable Premiere). Jamie Gillis and Annette Haven relive the playful past in the arousing reunion romp, **High School Memories**. And find out what **Christine's Secret** really is!

The heat is on June with the arrival of superstar Seka in **Anytime, Anyplace**. And the most talked about adult film of all time continues in the sensuous sequel **Deep Throat II**.

♡ In July, enjoy the critically-acclaimed adult film recognized by the New York Post as "an affectionate spicy slice of life" and acclaimed as a "sensitive portrayal of a woman's sexual awakening that explodes into torrid sexuality" by Penthouse. It's Candida Royalle's Femme Production of **Three Daughters**.

LET'S GET IT ON

DEEP THROAT II

♡ And that's only a handful of the pleasing premieres coming your way all summer long. Other highlights include luscious Amber Lynn in **Let's Get It On** and superstar Taija Rae in **W-PINK Part III**. And be on the lookout for two sexy Hollywood spoofs—the exciting premieres of **Ramb-ohh** and **Dirty Harriet**.

Join us for the most romantic films and featurettes all season long—Summer's Best from **TUXXEDO**.

AVN Preview

Video

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
1 Girls On Fire Miami Spice Forbidden Bodies Brat On The Run	**2** The Passion Within Matinee Idol Getting Personal Talk Dirty To Me III	**3** Supergirls Do General Hospital Woman in Love Satisfiers of Alpha Blue Eruption	**4** Ultimate Lover Made in Germany An Unnatural Act I Tasty	**5** Nothing To Hide Up, Up and Away Tickled Pink When She Was Bad	**6** *Sex Boat *Memoirs of Molly Mae The Oddest Couple Miami Spice	**7** Girls On Fire Good Girl, Bad Girl Pink Champagne *Let's Get It On
8 Blue Ecstasy in New York Baby Face II Peeping Tom Sex-A-Vision	**9** Sweet Alice Trasy Lady The Oddest Couple The Boss	**10** Erotica Beyond Desire Pussycat Galore Sexcapades	**11** Showdown Mouthwatering Deep Inside Trading The Adultress	**12** When She Was Bad Play Me Again, Vanessa I Want To Be Bad Trinity Brown	**13** *High School Memories Kinky Business Making It Big Flesh and Fantasy	**14** *Christine's Secret Coffee, Tea Or Me? Sweet Alice Tasty
15 Great Sexpectations That's Outrageous Nothing To Hide Made in Germany	**16** *Sex Boat Never So Deep Eruption Brat On The Run	**17** Tickled Pink *Let's Get It On Brat On The Run Talk Dirty To Me III	**18** The Passion Within Throat: 12 Years After Getting Personal Debbie Duz Dishes	**19** Pink Champagne Blame It On Ginger Erotica Deep Inside Trading	**20** Mouthwatering *Frat House The Boss Brat On The Run	**21** *Memoirs of Molly Mae Woman in Love Girls On Fire Sex-A-Vision
22 Coffee, Tea Or Me? Where There's Smoke There's Fire Trinity Brown Making It Big	**23** Never Sleep Alone Bodies in Heat Up, Up and Away The Adultress	**24** *High School Memories Debbie Duz Dishes [redacted] Sweet Alice	**25** Supergirls Do The Navy The Mistress When She Was Bad The Oddest Couple	**26** Erotica Peeping Tom Forbidden Bodies Throat: 12 Years After	**27** Girls On Fire *Let's Get It On Ultimate Lover Sexcapades	**28** *Sex Boat Erotic City Baby Face II Coffee, Tea Or Me?
29 *Frat House Deep Inside Trading Tasty Satisfiers of Alpha Blue	**30** *Memoirs of Molly Mae Sex Crimes 2064 Nothing To Hide Showdown	**31** *Christine's Secret Miami Spice Never So Deep Sweet Alice				

HI TECH

Murder on Monday

Wednesday

BEHIND THE SCENES

*) SHOW TIMES!

1st Movie: 7:30 PM, 1:30 AM
2nd Movie: 9:00 PM, 3:00 AM
3rd Movie: 10:30 PM, 4:30 AM
4th Movie: 12 Midnight

(All Times Listed Are Eastern Time)
*Premiere Movies
Times and Titles Subject to Change

Erotic Triple X Theatre

June

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
			1 Coffee, Tea or Me Sex-a-Vision Making It Big Let's Get It On	**2** Nothing To Hide Memoirs of Molly Mae Made in Germany [redacted]	**3** The Passion Within Blue Ecstasy in New York *Desire Woman in Love	**4** Debbie Duz Dishes *Deep Throat II Talk Dirty To Me III Trashy Lady
5 The Boss Blame It On Ginger Erotica Kinky Business	**6** Memoirs of Molly Mae Sex Boat Christine's Secret The Oddest Couple	**7** Husbands & Wives Tickled Pink Bodies in Heat Pink Champagne Tasty	**8** Mouthwatering Ultimate Lover Where There's Smoke There's Fire Play Me Again, Vanessa	**9** Satisfiers of Alpha Blue Trashy Lady Frat House Deep Inside Trading	**10** Erotica *Lipps & McCaine That's Outrageous Never So Deep	**11** Christine's Secret Sexcapades *Charli Brat On The Run
12 Supergirls Do General Hospital Pussycat Galore Trinity Brown Bodies in Heat	**13** Ultimate Lover Beyond Desire Woman in Love Good Girl, Bad Girl	**14** Getting Personal The Adultress *Deep Throat II Frat House	**15** Debbie Duz Dishes Deep Inside Trading Girls On Fire [redacted]	**16** Matinee Idol Showdown Trashy Lady Sweet Alice	**17** *Sex Games of the Very Rich Erotica Coffee, Tea or Me Supergirls Do The Navy	**18** The Passion Within High School Memories *Anytime, Anyplace Satisfiers of Alpha Blue
19 Tickled Pink When She Was Bad Throat: 12 Years After Let's Get It On	**20** Pussycat Galore Play Me Again, Vanessa The Mistress *Lipps & McCaine	**21** Funny Business Christine's Secret I Want To Be Bad Made in Germany The Boss	**22** Erotica Trinity Brown *Charli Never So Deep	**23** The Oddest Couple Flesh and Fantasy Talk Dirty To Me III Blame It On Ginger	**24** *Superstar* *NIGHT* Memoirs of Molly Mae Making It Big Kinky Business *Deep Throat II	**25** *Desire The Passion Within Beyond Desire Showdown
26 Sweet Alice [redacted] Mouthwatering That's Outrageous	**27** Supergirls Do The Navy Trashy Lady High School Memories Girls On Fire	**28** The Passion Within Never So Deep Deep Inside Trading Matinee Idol	**29** *Sex Games of the Very Rich Miami Spice Ultimate Lover Showdown	**30** Frat House Beyond Desire *Anytime, Anyplace Bodies in Heat		

SHOW TIMES!

1st Movie: 7:30 PM, 1:30 AM
2nd Movie: 9:00 PM, 3:00 AM
3rd Movie: 10:30 PM, 4:30 AM
4th Movie: 12 Midnight

(All Times Listed Are Eastern)
*Premiere Movies
Times and Titles Subject to Change

VIDEO DUPLEX

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
					1 Sweet Alice Let's Get It On *Dirty Harriet Deep Inside Trading	**2** *In Love Matinee Idol Tickled Pink Great Sexpectations
3 Made In Germany Throat: 12 Years After Trashy Lady Baby Face II	**4** High School Memories When She Was Bad That's Outrageous An Unnatural Act	**5** The Adultress Pussycat Galore Desire Sex Boat	**6** Mouthwatering Lipps & McCaine Bodies in Heat Never Sleep Alone	**7** Blue Extasy in New York The Mistress Brat On The Run Supergirls Do General Hospital	**8** Beyond Desire Play Me Again Vanessa *Ramb-ohh! Miami Spice	**9** *Three Daughters The Boss Woman in Love Sex Games of the Very Rich
10 The Passion Within I Want To Be Bad Ultimate Lover Supergirls Do The Navy	**11** Christine's Secret Good Girl, Bad Girl Angel Gets Even Trashy Lady	**12** Memoirs of Molly Mae Made in Germany Nothing To Hide *In Love	**13** Erotica *Dirty Harriet The Adultress Getting Personal	**14** Debbie Duz Dishes The Boss Flesh and Fantasy Sweet Alice	**15** Charli *Year of the Sex Dragon Throat: 12 Years After Sexcapades	**16** ONE STEP BEYOND Trinity Brown *W-PINK III Deep Inside Trading Frat House
17 Never So Deep Blame It On Ginger Girls On Fire Sex-A-Vision	**18** Great Sexpectations The Oddest Couple Debbie Duz Dishes Memoirs of Molly Mae	**19** Showdown Talk Dirty to Me III Miami Spice *Ramb-ohh!	**20** Blue Ecstasy In New York Flesh and Fantasy Sweet Alice The Boss	**21** Supergirls Do The Navy Deep Throat II The Passion Within Eruption	**22** Memoirs of Molly Mae Matinee Idol *In Love Nothing To Hide	**23** Sex Boat Kinky Business *Dirty Harriet Bodies In Heat
24 STREET HEAT Woman in Love Making It Big *Three Daughters Brat On The Run	**25** Never Sleep Alone Christine's Secret Sex Games Of The Very Rich Tickled Pink	**26** The Passion Within Never So Deep *Year Of The Sex Dragon Play Me Again, Vanessa	**27** Desire Satisfiers Of Alpha Blue Sex-A-Vision Ultimate Lover	**28** Nothing To Hide Girls On Fire That's Outrageous *W-PINK III	**29** *Three Daughters An Unnatural Act I Lipps & McCaine Pink Champagne	**30** Pleasure Wonderland Mouthwatering Tasty *Ramb-ohh! Anytime, Anyplace
31 *In Love [redacted] Deep Inside Trading Where There's Smoke There's Fire						

1st Movie: 7:30 PM, 1:30 AM
2nd Movie: 9:00 PM, 3:00 AM
3rd Movie: 10:30 PM, 4:30 AM
4th Movie: 12 Midnight
(All Times Listed Are Eastern Time)
*Premiere Movies
Times and Titles Subject to Ch[illegible]

Movie Guide

a

THE ADULTRESS (1986) Starring Krista Lane, Shen St. Claire. May 11, 23, June 14, July 13.

***ANYTIME, ANYPLACE** (1982) Seka stars as a bumbling burglar who travels the country with two ex-cons. Starring Mike Ranger. June 18, 30, July 11, 30.

b

BABY FACE II (1985) All-Star action at an outrageous bachelorette party. Starring Lois Ayres, Jerry Butler. May 8, 28, July 3.

BEYOND DESIRE (1986) Starring Seka, John Leslie. May 10, June 13, 30, July 8.

BLAME IT ON GINGER (1986) Starring Ginger Lynn, Jamie Gillis. May 19, June 5, 23, July 17.

BLUE ECSTASY IN NEW YORK (1980) A prudish young lady clashes with her very uninhibited alter ego. Starring Leslie Bovee, Samantha Fox. May 8, June 3, July 7, 20

BODIES IN HEAT (1983) Murder and theft in this heated tale of marital mischief. Starring Annette Haven, Herschel Savage. May 23, June 12, 30, July 6, 23.

THE BOSS (1986) Starring Krista Lane, Mike Horner. May 9, 20, June 5, 21, July 9, 20

BRAT ON THE RUN (1986) Starring Shana McCullough, Tom Byron. May 1, 16, 20, June 11, July 7, 24.

c

***CHARLI** (1981) Fantasy fuses with reality when a caring couple decides to spice up their life Starring Jessie St. James, Billy Dee. June 11, 22, July 15.

***CHRISTINE'S SECRET** (1985) A charming country inn is the setting for a series of stolen affairs and one young woman's romantic awakening. Starring Carol Cross, Talia Rae. May 14, 31, June 11, 21, July 11.

COFFEE, TEA OR ME (1982) Starring Jamie Gillis, Juliet Anderson. May 22, June 1, 17.

d

DEBBIE DUZ DISHES (1986) Starring Nina Hartley, Jerry Butler. May 18, 24, June 4, 15, July 18.

DEEP INSIDE TRADING (1988) Ruthless stock market manipulators clash for cash in this seedy tale of yuppies gone bad. TUX-EDO exclusive. Starring Krista Lane, Rick Savage May 11, 19, 29, June 9, 15, 28, July 1, 16.

***DEEP THROAT II** (1987) Krista Lane stars as a politician's wife who declares all-out war on pornography in this long-awaited sequel to the most famous adult film ever made. Starring Sheena Horne, Jamie Gillis. June 4, 14, 24, July 21.

***DESIRE** (1985) A bewildered boyfriend learns the true meaning of desire from a seductive lady psychologist. Starring Herschel Savage, Tamara Longley. June 3, 25, July 5, 27.

***DIRTY HARRIET** (1987) Undercover cops go to great lengths in this sensuous action thriller. Starring Candie Evens, Cara Lott, Peter North. July 1, 13, 23.

PRETTY PEACHES II

e

EROTICA (1984) Renowned columnist uncovers the inside scoop at a word famous strip joint. Starring Brigite Lahti. May 10, 26, June 10, 22, July 13.

EROTIC CITY (1985) Starring Jamie Gillis, Amber Lynn. May 28.

ERUPTION (1978) Starring Leslie Bovee, Susan Hart. May 3, 16, July 21.

f

FLESH AND FANTASY (1985) Starring Talia Rae, Ron Jeremy, Sharon Kane. May 13, June 23, July 20.

FORBIDDEN BODIES (1986) Starring Tom Byron, Jeanette Littledove, Candie Evens, Krista Lane. May 1, 26.

***FRAT HOUSE** (1979) Panty raids and pie fights spice up this collegiate collection of sophomoric seductions. Starring Lisa DeLeeuw, Turk Lyon. May 20, 29, June 9, 30, July 16.

g

GETTING PERSONAL (1985) Starring Colleen Brennan, Herschel Savage. May 18, June 14, July 13.

GIRLS ON FIRE (1984) Sophisticated romp involving a gangster's wife, two insurance agents and an erotic fashion show. May 1, 7, 21, 27, June 15, 27, July 17.

GOOD GIRL, BAD GIRL (1984) Starring Colleen Brennan, Joey Silvera. May 7, June 13, July 11

GREAT SEXPECTATIONS (1983) Starring R. Bolla Sharon Kane. May 15, July 18.

h

***HIGH SCHOOL MEMORIES** (1981) An arousing reunion of high school jocks and eager cheerleaders. Starring Jamie Gillis, Annette Haven. May 13, 24, June 18, 27, July 4.

i

I WANT TO BE BAD (1984) Husband, wife and secretary clash in this exciting re-working of the traditional romantic triangle. Starring Kay Parker, John Martin. May 12, June 21, July 10.

***IN LOVE** (1983) Grand romantic epic depicting the tribulations of a ten year love affair. Starring Jerry Butler, Kelly Nichols, Jack Wrangler. July 2, 13, 22, 31.

k

KINKY BUSINESS (1984) Starring Tom Byron, Ginger Lynn. May 13, June 5, 24, July 23.

l

***LET'S GET IT ON** (1986) Heated series of all-star vignettes. Starring Amber Lynn, John Leslie, Shana McCullough, Tom Byron. May 7, 17, 27, June 1, 19, July 1.

HIGH SCHOOL MEMORIES

***LIPPS AND MCCAINE** (1980) A romantic roundup of heroic cowboys, sexy barmaids and gambling rogues. Starring Paul Thomas, Amber Hunt. June 10, 20, July 6, 29.

m

MADE IN GERMANY (1987) The arrival of a sultry private tutor wreaks havoc in the lives of a wealthy surburban family. Starring Angela Baron, Mike Horner, Tracy Adams. May 4, 15, June 2, 21, July 12.

MAKING IT BIG (1984) Country girls takes on tinsel town in this classic re-working of the Hollywood Dream. Starring Jacqueline Lorians, Shaun Michelle. May 13, 22, June 1, 24, July 24.

MATINEE IDOL (1987) Starring Angel, John Leslie. May 2, June 16, 28, July 22.

***MEMOIRS OF MOLLY MAE** (1987) Romance novelist finds inspiration from an antique diary in this touching and hauntingly sentimental fantasy. Starring Krista Lane, Brandon. May 21, 30, June 6, 24, July 12, 22.

Movie Spin

MIAMI SPICE (1987) Undercover ladies bust a big-time drug dealer and deliver twice the vice. Starring Amber Lynn, Sheri St. Claire. May 6, 31, June 29, July 8, 19.

THE MISTRESS (1982) Starring Kelly Nichols, Richard Pacheco. May 25, June 20, July 7.

MOUTHWATERING (1986) Starring Taija Rae, Herschel Savage. May 20, June 8, 26, July 6, 30

n

NEVER SLEEP ALONE (1984) Starring John Leslie, Victoria Jackson. May 23, July 6, 25.

NEVER SO DEEP (1982) Director Gerard Damiano takes a cinematic tour of San Francisco in this sensual yarn of a private eye in search of the girl with the butterfly tattoo. Starring Loni Sander, Paul Thomas. May 16, 31, June 10, 28, July 17.

NOTHING TO HIDE (1984) Starring John Leslie, Richard Pacheco, Chelsea Manchester. May 5, 30, June 2, July 12, 28.

o

THE ODDEST COUPLE (1986) Starring Siobhan Hunter, Danielle, Paul Thomas. May 6, 25, June 6, 23, July 18

p

THE PASSION WITHIN (1986) Starring Nina Hartley, John Leslie. May 2, 18, June 3, 18, July 10, 26.

PINK CHAMPAGNE (1980) Starring Lisa de Leeuw, Jan Steele. May 7, 19, June 7, July 29.

PLAY ME AGAIN, VANESSA (1986) Starring Vanessa Del Rio, Taija Rae. May 12, June 8, 20, July 8, 26.

PUSSYCAT GALORE (1984) Starring Danielle, Joey Silvera. May 10, June 12, July 5.

S

SATISFIERS OF ALPHA BLUE (1981) Starring Richard Bolla, Lysa Thatcher. May 3, 29, June 18, July 27.

SEX-A-VISION (1986) Joey Silvera is a supernerd until he miraculously trades places with an adult film star and finds himself face to face with his favorite ladies. Starring Sherri St. Claire, Tamara Longley. May 8, 21, June 1, July 17.

NEVER SO DEEP

r

***RAMB-OHH** (1987) The scorching adventures of an all-girl platoon that uses persuasive measures to infiltrate enemy lines. Starring Tracy Adams, Peter North. July 8, 19, 30

***SEX BOAT** (1981) Rollicking romance on the high seas when two male stowaways cause waves aboard an all female cruise. Starring Cody Nicole, Randy West. May 6, 16, 28, June 6, July 23

SEXCAPADES (1983) A motion picture director fallen upon bad times turns to porn to make a quick buck. Starring Eric Edwards, Sharon Mitchell. May 10, 27, June 11, July 15.

SEX CRIMES 2084 (1985) Starring Sheri St. Claire, Robert Bullock. May 30.

***SEX GAMES OF THE VERY RICH** (1980) Greedy heirs lock horns over the desirable fortune of a wealthy industrialist. Starring Jenny Westbrook, Chris Chittel. June 17, 29, July 9, 25.

SHOWDOWN (1986) Starring Sharon Mitchell, Gina Carrera. May 11, 30, June 16, 29, July 19.

SUPERGIRLS DO GENERAL HOSPITAL (1984) Starring Taija Rae, Raven, Paul Thomas, Joey Silvera, Ginger Lynn. May 3, June 12, July 7.

[redacted]

SWEET ALICE (1983) Lovelorn cowboy takes off to the city in search of his porn star bride. Seka stars. May 14, 24, June 16, 26, July 1, 20.

t

TALK DIRTY TO ME III (1984) A sumptuous mermaid learns about life as a land lubber in this sexy sport of *Splash*. Starring Lisa DeLeuuw, Ginger Lynn, Peter North. May 2, 17, June 4, 23, July 19

TASTY (1986) Starring Hyapatia Lee. May 4, 29, June 7, July 30

THAT'S OUTRAGEOUS (1983) Starring Jamie Gillis, Frannie Lomay, Joey Silvera, Natasha. May 15, June 10, 26, July 4, 28.

***THREE DAUGHTERS** (1986) Lush, affectionate portrayal of one household and three sensitive young women in director Candida Royalle's critically acclaimed Femme production. Starring Gloria Leonard, Siobhan Hunter. July 9, 29.

THROAT: 12 YEARS AFTER (1984) Starring Joanna Storm, Eric Edwards, Jerry Butler, Sharon Kane. May 18, June 19, July 3, 15.

TICKLED PINK (1985) Starring Sharon Kane, Joey Silvera. May 5, 17, June 7, 19, July 2

TRASHY LADY (1985) Starring Ginger Lynn, Harry Reems. May 9, June 9, 27, July 3.

TRINITY BROWN (1984) First rate movie of a male/female cop team investigating a Mafia figure's murder. Starring Colleen Brennan, John Leslie, Kimberly Carson, Jamie Gillis. May 12, 22, June 12, 22, July 16.

u

ULTIMATE LOVER (1986) Starring Nina Hartley, Eric Edwards, Amber Lynn. May 4, 27, June 13, 29, July 10, 27.

AN UNNATURAL ACT I (1984) Starring John Leslie, Desiree Lane. May 4, July 4, 29

UP, UP AND AWAY (1984) Starring Cody Nicole, Ginger Lynn. May 5, 23.

CHARLI

w

WHEN SHE WAS BAD (1983) Bittersweet, seductive tale of a promiscuous couple and their confused daughter. Noted performances by Georgina Spelvin, John Leslie, Chelsea Manchester. May 5, 12, 25, June 19, July 4.

WHERE THERE'S SMOKE, THERE'S FIRE (1987) Angela Baron headlines as an ace reporter who follows any lead. Mike Horner is the jealous husband who suspects sloppy journalism. Starring Angel Kelly, Joey Silvera. May 22, June 8, July 31

WOMAN IN LOVE (1980) Starring Lorien Dominique, Richard Bolla. May 21, June 13, July 9, 24.

***WPINK-III** (1987) A very unique television network fights for the right to stay on the air. Starring Taija Rae, Tom Byron. July 16, 28.

y

***THE YEAR OF THE SEX DRAGON** (1986) Tiffany Storm turns a decaying massage parlor into a gold mine. Directed by Run Jeremy. July 15, 26

Mini-Features

Sprinkled throughout every evening of **TUXXEDO** is our spicy collection of popular mini-features. From erotic sports to exotic profiles, here's a sneak peek at some of the enticing featurettes you'll find all night long:

CLUB TUXXEDO Join the gorgeous hunks and stunning babes who frequent the most exclusive nightclub around: ***Club Tuxxedo***. It's the hot spot where lovers meet and sensual dancers take the stage. We've reserved you a front row seat.

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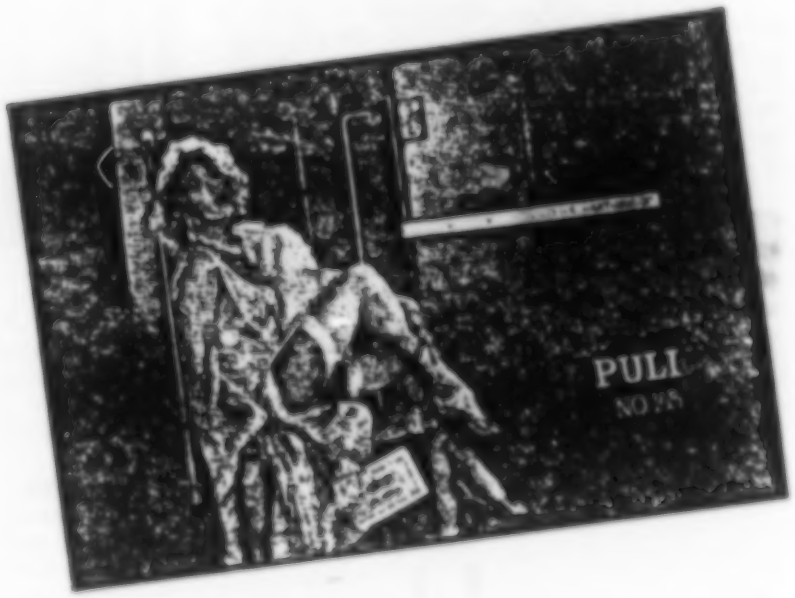

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Nos. 87-470 and 87-614

In the

Supreme Court of the United States

October Term, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

vs.

STATE OF INDIANA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

and

RONALD W. SAPPENFIELD, FANTASY ONE, INC., and FANTASY TWO, INC.,

Petitioners,

vs.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS FOR THE FIRST DISTRICT

MOTION OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AND INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED.

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MOTION OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AND INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED.

—o—

STATEMENT

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, and the International

Periodical Distributors Association, Inc. (collectively referred to as *amici*), hereby respectfully move for leave pursuant to Rule 42 of the Rules of the Supreme Court of the United States to file the attached joint brief, *amici curiae*, in support of the petitioners, Fort Wayne Books, Inc., Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy Two, Inc. Attorneys for petitioners consented thereto; the consent of the attorney for respondents was requested but refused.

The Amici

The *amici's* members publish, produce, distribute, and sell books, magazines, and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is the major national association of booksellers in the United States. ABA has approximately 4,000 members consisting of over 6,000 retail outlets. The members include private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is the major national association in the United States of publishers of general books, textbooks and educational materials. Its members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is the national trade association for almost four hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

Interest of the Amici

The interest of *amici* reflects their continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on materials with sexual content. *Amici's* brief will demonstrate how the legal principles involved in these two cases impact upon those who produce, distribute and sell material which is not obscene.

Although the cases *sub judice* involve "adult" bookstores, the RICO statute upheld by the Indiana Supreme Court, and similar RICO statutes in other jurisdictions,[1]

---

[1] The Indiana RICO statute is modeled after the Federal RICO statute (18 U.S.C. § 1961 *et seq.*) and is similar to the RICO statutes of many other states.

are by no means limited to businesses which deal primarily in sexually explicit materials. In fact the padlocking of stores and massive seizure of printed materials involved in the two cases decided below did not distinguish between obscene and First Amendment protected materials. Everything was seized. The statute is drawn so broadly that it permits the massive seizure and forfeiture of assets, including non-obscene books and periodicals, from a business that does not carry a single obscene title but is shown only to have violated provisions relating to materials deemed "harmful to minors." Such a harsh possible result obviously chills the exercise of First Amendment rights by the legitimate booksellers, distributors and publishers who are the members of *amici*.

This concern of legitimate businesses is not unwarranted. There has been rising agitation directed against booksellers, publishers and distributors handling First Amendment protected materials. *Amici* cite but a few troubling recent examples. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but which were adjudged to be protected by the First Amendment. See *Council for Periodical Distributors Association v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987). At the national level, the Attorney General's Commission on Pornography ("Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order requiring the retraction of the charge and advice to the recipients that earlier communications from the Commission were of

no legal effect and to be ignored. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp 581 (D.D.C. 1986). In its subsequent July 1986 report, the Commission not only endorsed broad new law enforcement initiatives, but also encouraged "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment. Attorney General's Commission on Pornography, *Final Report*, 421-23 (July 1986).

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides as effective means to substantially eliminate obscenity businesses." *Id.* at 435, 498. Although the Commission did not say so, RICO also provides an effective means to eliminate legitimate businesses which may have inadvertently crossed the gray line between what is obscene and what is not, as well as an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which may not meet with the approval of a faction in the community.

Unless the Court reaffirms the existing doctrine relating to prior restraints, and continues to insist on adequate procedural safeguards where seizures of presumptively First Amendment protected materials are involved, RICO statutes like the Indiana law in these cases will surely chill the production and distribution of a wide range of First Amendment protected materials.

Amici filed an *amicus* brief in *Fort Wayne Books, Inc. v. Indiana* in support of the petition for certiorari, their

motion to file same having been granted. 108 S. Ct. 1106 (1988).

In view of the foregoing, *amici* seek leave to file the attached brief.

Respectfully submitted,

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Dated: May 11, 1988

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BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AND INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., AS AMICI CURIAE, IN SUPPORT OF PETITIONERS.

STATEMENT

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, and the International Periodical Distributors Association, Inc. (collectively re-

ferred to as *amici*), submit this joint brief, *amici curiae,* Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy in support of the petitioners, Fort Wayne Books, Inc., Two, Inc., having submitted a motion for permission to file same.

Interest of the Amici and Summary of Argument

The interest of the *amici* reflects their continuing interest in the decisions of this Court balancing First Amendment rights and restrictions on materials with sexual content. *Amici's* brief will demonstrate how the RICO penalties at issue in these two cases create an unconstitutional prior restraint on First Amendment protected materials, and will have a chilling effect on the activities of those who produce, distribute and sell material which is not obscene.

Although the cases *sub judice* involve "adult" bookstores, the RICO statute upheld by the Indiana Supreme Court, and similar RICO statutes in other jurisdictions, are by no means limited to businesses which deal primarily in sexually explicit materials. In fact the padlocking of stores and massive seizure of printed materials involved in the two cases decided below did not distinguish between obscene and First Amendment protected materials. Everything was seized. The statute is drawn so broadly that it permits the massive seizure and forfeiture of assets, including non-obscene books and periodicals, from a business that does not carry a single obscene title but is shown only to have violated provisions relating to materials deemed "harmful to minors." The threat of such a death penalty on one's business obviously chills the exercise of First Amendment rights by booksellers, distributors and publishers who are not themselves dealers in obscene ma-

terials. Cautious booksellers would avoid any publication which treads too close to the obscenity or "harmful to minors" threshold for fear of triggering draconian RICO penalties.

The concern of legitimate businesses that these RICO statutes will be used to curtail protected speech and publishing activities is hardly speculative. There has been rising agitation directed against booksellers, publishers and distributors handling First Amendment protected materials. *Amici* cite but a few troubling recent examples. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but which were adjudged to be protected by the First Amendment. See *Council for Periodical Distributors Association v. Evans,* 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part,* 827 F.2d 1483 (11th Cir. 1987). At the national level, the Attorney General's Commission on Pornography (the "Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order requiring the retraction of the charge and advice to the recipients that earlier communications from the Commission were of no legal effect and to be ignored. *Playboy Enterprises, Inc. v. Meese,* 639 F. Supp. 581 (D.D.C. 1986). In its subsequent July 1986 report, the Commission not only endorsed broad new law enforcement initiatives, but also encouraged "private" boycotts, picketing, and other "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment. Attorney

General's Commission on Pornography, *Final Report* at 421-23 (July 1986).

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides an effective means to substantially eliminate obscenity businesses." *Id.* at 435, 498. Although the Commission did not say so, RICO also provides an effective means to eliminate legitimate businesses which may have inadvertently crossed the gray line between what is obscene or "harmful to minors" and what is not, as well as an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which offends a vocal minority within a community.

Amici contend that the Indiana RICO statute and similar statutes violate the First Amendment in that they constitute an unconstitutional prior restraint on First Amendment protected materials under the doctrine first defined in *Near v. Minnesota*, 283 U.S. 697 (1931), that the statutes will have a chilling effect on First Amendment protected expression, and, further, that the statutes do not include the special protections that the Court has consistently imposed with respect to the seizure of presumptively First Amendment protected material.

The Challenged Statute

The Indiana RICO statute was enacted in 1980, and is similar to the federal RICO statute, 18 U.S.C. § 1961 *et seq.* Basically, the statute provides that anyone who

acquires, maintains, or participates in any business through a "pattern of racketeering activity" is guilty of "corrupt business influence," a Class C felony. Ind. Code § 35-45-6-2. A pattern of racketeering activity is in turn defined as commission in the course of five years of two related offenses from a list of specified offenses. Ind. Code § 35-45-6-1. As interpreted by the Indiana Supreme Court, conviction for the offenses is not required. *4447 Corporation v. Goldsmith*, 504 N.E.2d 559, 566 (Ind. 1987). The list of offenses includes all Indiana obscenity law crimes. These crimes include not only importation or sale of obscene matter (Ind. Code § 35-49-3-1), but also disseminating to minors matter harmful to minors, displaying matter harmful to minors in an area to which minors have visual, auditory or physical access, or displaying for sale matter harmful to minors within 500 feet of a church or school. (Ind. Code § 35-49-3-3). In addition to the criminal penalty, the State may invoke the full panoply of civil sanctions contained in Indiana Code Sections 34-4-30.5-1 through 30.5-4.

The civil remedies available for a violation of the Indiana RICO law are severe. They include forfeiture of any property derived from or used in the course of the RICO violation. Ind. Code § 34-4-30.5-3. Property may even be seized for forfeiture, and placed under seal or removed, by an officer on ex parte court order up to 180 days prior to the filing of any formal adversary forfeiture action. Ind. Code § 34-4-30.5-4. In the cases *sub judice* the entire contents of several bookstores were seized, without even an *ex parte* review of most of the material, which included First Amendment protected materials. In

fact, the Indiana Supreme Court stated it to be "irrelevant" whether the assets seized and forfeited were obscene or not. 504 N.E.2d at 565. In addition, the Court may, on the bringing of an action to enjoin a violation, issue an injunction "prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of" the RICO law. Ind. Code § 34-4-30.5-2(2).

An injunction will be granted on a showing by a preponderance of the evidence that a RICO violation has occurred. Similarly, property may be civilly forfeited on a showing by a preponderance of the evidence that the property was derived from or used in the course of a RICO violation. Thus, massive forfeitures of property and injunctions against engaging in similar businesses in the future may be effected even without a criminal conviction for the triggering violations, which, if it were required, would require proof beyond a reasonable doubt. As described by the Indiana intermediate appellate court, the RICO statute permits "seizure orders of indefinite duration and create[s] a remedy of permanent forfeiture which would extend the protected materials and neutral instrumentalities." *4447 Corporation v. Goldsmith*, 479 N.E.2d 578, 590 n. 8 (Ind. Ct. App. 1985).

———o———

ARGUMENT

I

THE INDIANA RICO STATUTE CONSTITUTES AN UNCONSTITUTIONAL PRIOR RESTRAINT WHEN APPLIED BASED ON PREDICATE OFFENSES RELATING TO PRESUMPTIVELY FIRST AMENDMENT PROTECTED MATERIAL.

The Indiana RICO statute provides for pre-judgment seizure and subsequent forfeiture of "any property used in the course of, intended for use in the course of, derived from, or realized through" a RICO violation. Ind. Code §§ 34-4-30.5-3 and 30.5-4. The overwhelming majority of books in a typical bookstore are not obscene, and most could not be deemed harmful to minors. Nevertheless, if over a five year period a store twice sold books judged by a particular community to be obscene, or sold to two minors books deemed harmful to those minors, or even, under the Indiana law, merely displayed two books harmful to minors in an area accessible to minors, the entire inventory of the store and all of its assets would be subject to forfeiture.[2] The store would thus be prevented from distributing the protected materials which at all times constituted an overwhelming portion of its business. The intent and obvious effect of this forfeiture provision (as demonstrated by its enforcement in this case and its companion cases below) is to cause a forfeiture of the entire business enterprise through which the violation was com-

[2] It may, in fact, subject the assets of an entire chain of stores to seizure and forfeiture. In a recent federal RICO indictment brought in the Eastern District of Virginia, forfeiture of a chain of video stores was sought. *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987).

mitted, and thereby prevent the individuals involved from continuing in the same general line of business. Ind. Code § 34-4-30.5-2(2) lends further support to this construction, since it expressly authorizes a court to issue an injunction prohibiting a defendant from engaging in a similar business.

When the predicate offense relates to sexually explicit materials and when the business is a bookstore, chain of stores, distributor of written materials, or publisher, these RICO penalties clearly constitute a prior restraint violative of the First Amendment. The Court has consistently stated that "[a]ny system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc. v. Sullivan,* 372 U.S., at 70; *New York Times Co. v. United States,* 403 U.S., at 714; *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne,* 393 U.S. 175, 181 (1968); *Near v. Minnesota ex rel. Olson,* 283 U.S., at 716. The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable. See *Speiser v. Randall,* 357 U.S. 513 (1958)." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558-559 (1975) (quoted with approval in *Vance v. Universal Amusement Co.,* 445 U.S. 308, 316 n. 13 (1980)).

The prior restraint imposed in these two cases and generally permitted under the Indiana and other similar RICO statutes is virtually identical to that struck down by the Court over 50 years ago in *Near v. Minnesota,* 283 U.S. 697 (1931). The statute in *Near* authorized enjoining a person who published an obscene or defamatory periodical from further publication of the periodical. Consistently since *Near* it has been clear that one cannot be punished for speech by the prohibition of future speech. *See, e.g., City of Paducah v. Investment Entertainment, Inc.,* 791 F.2d 463 (6th Cir.), *cert. denied,* 107 S. Ct. 316 (1986); *Gayety Theaters, Inc. v. City of Miami,* 719 F.2d 1550 (11th Cir. 1983); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.,* 485 F. Supp. 777 (D. Utah 1980).

Notwithstanding *Near* and its progeny, the Supreme Court of Indiana swept aside prior restraint concerns by reasoning that the RICO statute's forfeiture remedy

> "is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity. Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene."

4447 Corporation v. Goldsmith, 504 N.E.2d at 565 (Ind. 1987).

This Court, however, has made clear that the question of whether a statute operates a prior restraint must be determined not through such formal anaylsis but through a realistic inquiry into the actual effects of the

statute on protected expressive activity. As stated in *Near*, "in passing upon constitutional questions the court has regard to substance and not to mere matters of form . . . ; in accordance with familiar principles, the statute must be tested by its operation and effect." *Near v. Minnesota*, 283 U.S. at 708. As further stated in *Organization For A Better Austin v. Keefe*, a prior restraint exists where "the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature. . . ." 402 U.S. at 418-419 (1971).

The plain effect of the forfeiture provision is to restrain future expression because of the content of prior expression. The court below avoided First Amendment analysis merely by recharacterizing the seized books and periodicals as "assets acquired through racketeering activity," indistinguishable from drugs, gambling equipment or other contraband. No such facile recharacterization can alter the fact that the statute's seizure and forfeiture provisions create the substantive harm that prior restraint doctrine aims to prevent—the repression of valuable expressive materials, which have not been adjudged obscene, as a consequence of prior speech. Labelling such expression as "racketeering" can no better strip away First Amendment protection than does labelling speech or speakers as "Nazi" (*Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978)); "Communist" (*DeJonge v. Oregon*, 299 U.S. 353 (1937)); anti-semitic (*Near v. Minnesota, supra*); or "subordinators of women"

(*American Booksellers Ass'n, Inc. v. Hudnut*, 774 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986)).[3]

The flaw in the Indiana RICO provisions is thus the same as in both *Near* and *Vance v. Universal Amusement Co.*, 445 U.S. at 311, fn. 3:

> In both cases the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be "dim and uncertain." *Bantam Books v. Sullivan* [cite omitted]. The separation of these forms of speech calls for "sensitive tools," *Speiser v. Randall* [cite omitted].

Such sensitivity is hardly shown by the statement of the court below that the separation between obscene and protected materials is "irrelevant."

While the RICO statute's forfeiture penalties clearly operate as an unconstitutional prior restraint when applied, perhaps more ominous and pervasive is the chilling effect which the mere threat of these draconian penalties will have on protected First Amendment activities. Booksellers, distributors and publishers will doubtless be inclined to avoid a provocative publication which may be viewed by

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[3] To the extent that crimes of violence or coercion are committed in the production of sexually-oriented material, state and federal laws, including RICO laws, provide ample opportunity for the prosecution of perpetrators. The only effect of adding the specific crime of dealing in obscenity to the list of predicate RICO offenses is to target RICO's harsh penalties at those who are criminals solely because the content of their speech is offensive. Hence, the ones prosecuted under the statute *sub judice* are not organized criminals or those who allegedly use kidnapping, violence, drugs, or coercion in the course of producing obscene material.

some as too close to the obscenity threshold when an error in judgment could lead to the forfeiture of one's business. The threat to First Amendment protections is always especially acute where questions of obscenity or "harmful to minors" are involved because "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." *Bantam Books v. Sullivan,* 372 U.S. at 66 (1963). While the question of whether a chemical substance is an illegal drug may be determined objectively in any laboratory, the determination as to whether books or periodicals are obscene will vary from community to community, and from jury to jury, as each applies the standard of *Miller v. California,* 413 U.S. 15 (1973). The threshold of First Amendment protection becomes even dimmer and less certain when the "harmful to minors" standard of *Ginsberg v. New York,* 390 U.S. 629 (1968), is at issue, since such material by definition is First Amendment protected and has serious literary, artistic, political, or scientific value.[4]

Many familiar examples serve as reminders that books now recognized as literary classics were once banned as obscene under the standards of their day. If a RICO statute like the one involved in these cases had been widespread a few decades ago, booksellers might have had

[4] That such "harmful to minors" statutes are subject to a multitude of widely divergent interpretations is well demonstrated by this Court's recent decision in *Virginia v. American Booksellers Association, Inc.,* 108 S. Ct. 636 (1988) (certifying to the Virginia Supreme Court the question of how such a statute should be interpreted). In the absence of a definitive state court interpretation of a "harmful to minors" statute, a bookseller could find his store padlocked after an *ex parte* RICO hearing merely because he had sold or displayed copies of a provocative bestseller to minors.

their doors padlocked merely for stocking the latest copies of works by Theodore Dreiser, D.H. Lawrence, or Edmund Wilson. *Commonwealth v. Friede,* 271 Mass. 318, 171 N.E. 472 (1930) (Dreiser's *An American Tragedy* held obscene); *Commonwealth v. Delacey,* 271 Mass. 327, 171 N.E. 455 (1930) (Lawrence's *Lady Chatterley's Lover* held obscene); *People v. Doubleday & Co.,* 272 App. Div. 799, 71 N.Y.S. 2d 736, *aff'd* 297 N.Y. 687, 77 N.E.2d 6 (1947), *aff'd* 335 U.S. 848 (1948) (Wilson's *Memoirs of Hecate County* held obscene). Such cases as *Playboy Enterprises, Inc. v. Meese,* 639 F. Supp. 581 (D.D.C. 1986) and *Council for Periodical Distributors Association v. Evans,* 642 F.Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part,* 827 F.2d 1483 (11th Cir. 1987), show the real danger that a vocal minority in a community will use the RICO statutes to threaten the very business of any bookseller who deals in material which, though constitutionally protected, they deem objectionable. The burden will be particularly great on a regional or national book or periodical business which, by distributing material which might be considered obscene or harmful to minors in only two communities in the state, could potentially have its entire business seized.

II

THE INDIANA RICO STATUTE IS ALSO UNCONSTITUTIONAL BECAUSE IT LACKS ANY OF THE PROCEDURAL SAFEGUARDS REQUIRED WHEN PRESUMPTIVELY FIRST AMENDMENT PROTECTED MATERIALS ARE SEIZED.

The Indiana RICO statute is also unconstitutional and should also be invalidated for failure to comply with the Court's prior rulings imposing procedural safeguards on

the seizure of presumptively First Amendment protected materials. Under the statute, property may be seized for forfeiture up to 180 days before any forfeiture action is even commenced. Ind. Code § 34-4-30.5-4. Furthermore, when the forfeiture proceeding is eventually filed, the statute imposes no fixed time limit for judicial resolution of the action, and does not even urge that resolution be prompt. In both of the cases under review, the trial courts' orders compelling the padlocking of bookstores and the seizure of all items within were issued after *ex parte* hearings, without notice to the booksellers or their attorneys. To this day, no trial date has been set in either case. This open-ended period of seizure, based on a mere probable cause showing, violates the requirement that "any restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Freedman v. Maryland*, 380 U.S. 51, 59 (1965).

As stated in *Speiser v. Randall*, 357 U.S. at 525 (1958), the separation of obscene and protected speech requires "sensitive tools." State and federal RICO statutes are anything but sensitive tools, as evidenced by the statement of the Indiana Supreme Court that the obscenity or non-obscenity of the seized assets is irrelevant.[5] *4447 Cor-*

[5] Even where First Amendment concerns are absent, the RICO penalty provisions have been severely criticized as crude and insensitive tools, lacking in various procedural safeguards. *See, e.g.*, Markus, *Procedural Implications of Forfeiture Under RICO, the CCE and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure*, 59 Temple L. Q. 1097 (1986); Note, *Civil RICO Is A Misnomer: The Need for Criminal Procedural Protections In Actions Under 18 U.S.C. § 1964*, 100 Harvard L. Rev. 1288 (1987).

poration v. Goldsmith, 504 N.E.2d at 565. To permit the broadscale seizure and forfeiture of protected expressive materials by means of RICO statutes is to make a mockery of the constitutionally required procedural safeguards imposed to guard against prior restraint of materials presumptively protected by the First Amendment.

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CONCLUSION

As this Court has recently reiterated, "[f]reedoms of expression require 'breathing space.'" *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 880 (1988) (quoting *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986)). Moreover, the prior restraint doctrine is premised on the conviction that the circulation of offensive speech is a lesser cost than the unacceptable alternative of suppressing protected expression. As Madison said of the press: "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits." 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 571 (J. Elliott ed. 1866). Whatever the wisdom of pursuing the eradication of sexually explicit materials, attempts to eliminate them can only be undertaken after complying with First Amendment requirements of heightened sensitivity, and procedural safeguards so that provocative, unorthodox and even offensive ideas and modes of expression are not quashed.

For the reasons set forth above, we respectfully urge this Court to reverse the orders under review.

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